

No. 14722

United States
Court of Appeals
for the Ninth Circuit

TERESA E. EASTMAN, Administratrix of the
Estate of Eric Gunner Eastman, deceased, or
individually as his surviving widow,
Appellant,

VS.

SOUTHERN PACIFIC COMPANY,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court
For the District of Oregon

Civil No. 6787

TERESA E. EASTMAN, Administratrix of the
Estate of Eric Gunner Eastman, Deceased, or
individually as his surviving widow,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant.

PRE-TRIAL ORDER

The above case came on regularly for pretrial conference before the undersigned Judge of the above entitled Court at Eugene, Oregon, on Wednesday, April 7, 1954. Plaintiff appeared by Elmer Sahlstrom and Nels Peterson, of her attorneys, and defendant appeared by John Gordon Gearin, of its attorneys.

The parties with the approval of the Court agreed to the following

Statement of Facts

I.

Plaintiff is a citizen, resident and inhabitant of the State of Oregon. Defendant is a Delaware corporation duly authorized to do business in the State of Oregon. The amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00.

II.

On or about the 16th day of October, 1952, Eric

Gunner Eastman was employed by defendant and while in defendant's yards in the City of Eugene, Lane County, Oregon, he was struck on the head by the door of a dump car causing injuries from which he died.

III.

Plaintiff is the duly qualified, appointed and acting administratrix of the estate of Eric Gunner Eastman, deceased, and brings this action for the benefit of herself as surviving widow of said Eric Gunner Eastman, deceased, or as his surviving dependent widow.

Plaintiff's Contention

Plaintiff contends that the defendant is a corporation engaged in the operation of a railroad within the State of Oregon and elsewhere, and owns and operates certain yards, tracks and premises in connection with the operation of said railroad in and around the City of Eugene, Oregon, and was the owner and had control of a certain dump car on or about October 16, 1952, which dump car was defective in that the door on said dump car would not operate; that prior to October 16, 1952, said defendant had placed said dump car upon its track in Eugene, Oregon, for repair of the mechanism upon the said dump car; that while said car was upon said tracks for the purpose of being repaired, Eric Gunner Eastman, deceased, was struck on the head by the door of said dump car causing injuries from which he died; that said dump car was designed for and used by said defendant for the

maintenance of its road beds and tracks within the State of Oregon and elsewhere.

Plaintiff contends alternatively as follows:

A. That defendant on and prior to October 16, 1952, was a common carrier by railroad engaged in interstate commerce or at and prior to the time of receiving the injuries hereinafter referred to said deceased was employed by defendant and part of his duties was in furtherance of interstate commerce or his duties directly or closely and substantially affected such commerce, and the accident complained of arose while decedent and defendant were engaged in the conduct of interstate commerce and that defendant was negligent in one or more of the following particulars at said time and place:

1. In failing to properly repair or maintain the door locking devices of the dump car.

2. In manipulating the dumping mechanism at a time when the door locks were in a state of disrepair and in an open position and decedent was standing in close proximity.

3. Failure to warn plaintiff of the dangerous nature of this particular dump car.

4. In failing to provide for decedent a safe place in which to work in that the defendant failed to provide an adequate guard about the area on the side toward which car was being dumped and the door being dropped and on which side fellow employees, including decedent, were standing, by means of a rope or other barricade.

5. In failing on the part of the defendant by its servants, agents and employees to ascertain that

all persons, including the decedent, were in the clear and out of the way of said dump car and drop door to be opened on the side of the car on which decedent was standing prior to the manipulation of the dump car mechanism and before releasing the dump car door.

6. In proceeding to manually force and pry into position the dumping arms of the aforementioned dump car at a time when the air was set or there was air in the dump car and at a time when the dumping mechanism of the dump car was not functioning properly and at a time when their fellow employees, including the decedent, were in the immediate area in which the drop side door would fall.

7. In failing to warn or instruct decedent of the fact that the air was set on the dump car or that there was air in the dump car, that the door locks on the side on which the door was to be dropped were in an open position and in a state of disrepair and in failing to give any warning at all prior to manually forcing into position the dumping mechanism causing the drop door to fall suddenly on the decedent.

8. In failing to inspect the dumping mechanism by a competent employee to ascertain the hazards attendant on the repair of said dump car.

9. In failing to comply with Safety Rule No. 4225 of said defendant company which provides as follows:

"In case of serious injury call the nearest company surgeon. If one cannot be secured, call the

nearest surgeon to serve until company surgeon arrives. While waiting, make the patient comfortable and keep crowd away."

10. In failing to provide prompt and adequate medical care and attention for the decedent immediately upon the decedent's receiving the injury; in failing to immediately take the decedent to a hospital and in allowing the decedent to walk from the dump car where the accident occurred, through the company yards to the company first aid station and elsewhere about the premises for approximately three hours at a time when the decedent was suffering from a large extra dural hematoma and skull fracture and until the decedent suffered a right sided convulsion and had lost consciousness.

B. That if decedent, Eric Gunner Eastman, at the moment of injury to him, was not engaged in interstate commerce and the defendant at such time was not engaged in the conduct of interstate commerce, then in that event, defendant corporation was in charge of, or responsible for, work involving risk or danger to its employees or the public, and that said defendant corporation was negligent in failing to use every device, care and precaution which it was practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the machine or apparatus in one or more of the following particulars:

1. In failing to properly repair or maintain the door locking devices of the dump car.

2. In manipulating the dumping mechanism at

a time when the door locks were in a state of disrepair and in an open position and decedent was standing in close proximity.

3. Failure to warn plaintiff of the dangerous nature of this particular dump car.

4. In failing to provide a guard or barricade by rope or other method so as to have prevented persons, including decedent, from entering the area immediately adjacent to said dump car when the same was undergoing repair.

5. In failing to ascertain that all persons, including the decedent, were in the clear and out of the way of the dump car and drop door to be opened on the side of the car on which the decedent was standing, prior to the manipulation of the dump car mechanism and before releasing the dump car door.

6. In failing to comply with the following provision of the Basic Safety Code for the State of Oregon, effective October 1, 1949, Section 3.10:

"Before proceeding with repair work on any apparatus, electrical, mechanical, or otherwise, the switch controlling the power, or the valve controlling the stock, or whatever the source shall be properly tagged out and, when practical, secured with a lock. Tags used for this purpose shall warn against starting of machines and shall bear the name of the person responsible for shutting down the apparatus, etc. All persons other than the one designated by the tag are prohibited from starting any such equipment or apparatus."

7. In failing to inspect said dump car by a com-

petent employee, or other person, at and prior to attempting to repair the same.

8. In proceeding to manually force and pry into position the dumping arms of the aforementioned dump car at a time when the air was set or there was air in the dump car and at a time when the dumping mechanism of the dump car was not functioning properly and at a time when their fellow employees, including the decedent, were in the immediate area in which the drop side door would fall.

9. In failing to warn or instruct decedent of the fact that the air was set on the dump car or that there was air in the dump car, that the door locks on the side on which the door was to be dropped were in an open position and in a state of disrepair and in failing to give any warning at all prior to manually forcing into position the dumping mechanism causing the drop door to fall suddenly on the decedent.

10. In failing to comply with Safety Rule No. 4225 of said defendant company which provides as follows:

“In case of serious injury call the nearest company surgeon. If one cannot be secured, call the nearest surgeon to serve until company surgeon arrives. While waiting, make the patient comfortable and keep crowd away.”

11. In failing to provide prompt and adequate medical care and attention for the decedent immediately upon the decedent's receiving the injury; in failing to immediately take the decedent to a hos-

pital and in allowing the decedent to walk from the dump car where the accident occurred, through the company yards to the company first aid station and elsewhere about the premises for approximately three hours at a time when the decedent was suffering from a large extra dural hematoma and skull fracture and until the decedent suffered a right sided convulsion and had lost consciousness.

C. That if decedent, Eric Gunner Eastman, at the time of injuries to him, was not engaged in interstate commerce and defendant corporation was not engaged in the conduct of interstate commerce, then in that event, defendant corporation at said time and place was an employer within the State of Oregon engaged in a hazardous occupation as defined by the Workmen's Compensation Law of the State of Oregon and was negligent in one or more of the following particulars:

1. In failing to properly repair or maintain the door locking devices of the dump car.

2. In manipulating the dumping mechanism at a time when the door locks were in a state of disrepair and in an open position and decedent was standing in close proximity.

3. In failing to warn plaintiff of the dangerous nature of this particular dump car.

4. In failing to provide for decedent a safe place in which to work in that the defendant failed to provide an adequate guard about the area on the side toward which car was being dumped and the door being dropped and on which side fellow em-

ployees, including decedent, were standing, by means of a rope or other barricade.

5. In failing on the part of the defendant by its servants, agents and employees to ascertain that all persons, including the decedent, were in the clear and out of the way of said dump car and drop door to be opened on the side of the car on which decedent was standing prior to the manipulation of the dump car mechanism and before releasing the dump car door.

6. In proceeding to manually force and pry into position the dumping arms of the aforementioned dump car at a time when the air was set or there was air in the dump car and at a time when the dumping mechanism of the dump car was not functioning properly and at a time when their fellow employees, including the decedent, were in the immediate area in which the drop side door would fall.

7. In failing to comply with the following provision of the Basic Safety Code for the State of Oregon, effective October 1, 1949, Section 3.10:

“Before proceeding with repair work on any apparatus, electrical, mechanical, or otherwise, the switch controlling the power, or the valve controlling the stock, or whatever the source shall be properly tagged out and, when practical, secured with a lock. Tags used for this purpose shall warn against starting of machines and shall bear the name of the person responsible for shutting down the apparatus, etc. All persons other than the one

designated by the tag are prohibited from starting any such equipment or apparatus."

8. In failing to warn or instruct decedent of the fact that the air was set on the dump car or that there was air in the dump car, that the door locks on the side on which the door was to be dropped were in an open position and in a state of disrepair and in failing to give any warning at all prior to manually forcing into position the dumping mechanism causing the drop door to fall suddenly on the decedent.

9. In failing to inspect the dumping mechanism by a competent employee to ascertain the hazards attendant on the repair of said dump car.

10. In failing to comply with Safety Rule No. 4225 of said defendant company which provides as follows:

"In case of serious injury call the nearest company surgeon. If one cannot be secured, call the nearest surgeon to serve until company surgeon arrives. While waiting, make the patient comfortable and keep crowd away."

11. In failing to provide prompt and adequate medical care and attention for the decedent immediately upon the decedent's receiving the injury; in failing to immediately take the decedent to a hospital and in allowing the decedent to walk from the dump car where the accident occurred, through the company yards to the company first aid station and elsewhere about the premises for approximately three hours at a time when the decedent was suffering from a large extra dural hematoma and skull

fracture and until the decedent suffered a right sided convulsion and had lost consciousness.

Plaintiff further contends that one or more of the aforesaid acts of negligence on the part of the defendant were the proximate cause of the injury and death of decedent; that this action is brought for the benefit of Teresa E. Eastman as the dependent widow of decedent and his sole dependent, or alternatively, individually as his surviving dependent widow, and she has been damaged by reason of the death of said Eric Gunner Eastman in the sum of \$75,000.00.

Plaintiff as the personal representative, further contends that she is entitled to recover the sum of \$10,000.00 for conscious pain and suffering of decedent between 9:00 a.m. and 10:40 p.m. of the day of his death.

Defendant denies the foregoing and specifically denies it was guilty of negligence in any particular charged or that any act or omission on its part constituted a proximate cause of conscious pain and suffering or the death of the decedent.

Defendant's Contentions

I.

Defendant contends that ordinarily Eric Gunner Eastman, the deceased, would have been working for the defendant in interstate commerce or in the furtherance thereof, but at the time of his fatal injury he had left the work to which he had been assigned and without any necessity or excuse there-

for was watching other workmen who were engaged in repair of a dump car.

II.

Defendant further contends that the Southern Pacific Company Hospital Department is a separate and distinct legal entity created solely by an award of the National Railway Labor Board and arbitration proceedings between the Southern Pacific Company and various railway labor organizations and said Hospital Department is governed by a board of thirteen members, seven of whom are Brotherhood representatives and six of whom are Company representatives and therefore Southern Pacific Company is not responsible for any alleged improper medical care or attention.

III.

Defendant contends the deceased was guilty of negligence constituting a proximate or contributing cause of his injury and death in that

(a) he voluntarily left work to which he had been assigned and stood by and in close proximity to a dump car which was being repaired when there was no justification or excuse for his so doing;

(b) he failed to pay heed to the instructions and warning given by other employees to stand in the clear of said dump car

(c) he suddenly and without warning left his place of safety alongside said dump car and walked forward directly alongside the said dump car when

he knew or in the exercise of reasonable care ought to have known that it was unsafe for him so to do.

* * * * *

Exhibits

Certain physical exhibits have been identified and received as pretrial exhibits, the parties agreeing, with the approval of the Court that no further identification of exhibits is necessary. In the event that said exhibits, or any thereof, should be offered in evidence at the time of trial, said exhibits are to be subject to objection only on the ground of relevancy, competency and materiality.

Plaintiff's Exhibits

1. Series of photographs.
2. Standard certificate of death.
3. Letters of Administration.
4. Motive Power and Car Departments Agreement between Southern Pacific Company and System Federation No. 114 Railway Employees Department American Federation of Labor Mechanical Section thereof.
5. Book on Southern Pacific Company Safety Rules.
6. Book on Safety Rules — Spokane, Portland and Seattle Railway Company.
7. Deposition of Jerome Delmas Lambert.
8. Deposition of Bruce McGregor.
9. Deposition of Austin E. Barker.
10. Deposition of Carl Myron Wood.
11. Deposition of Kenneth Earl Sutton.

12. Sealed exhibit for Impeachment purposes only.
13. 2 Railroad Passes—1949-1951, 1952-1954.
14. 2 Income Tax Returns for 1951 and 1952 (State).
15. Honorable Discharge from U. S. Army.
16. Basic Safety Code for the State of Oregon.
17. Defendant's Answer.

Defendant's Exhibits

1. Certified copy of award of National Railway Labor Board.
2. Photographs.
3. Map.
4. Plaintiff's adverse party deposition.
5. Deposition of Jerome Delmas Lambert.
6. Deposition of Bruce McGregor.
7. Deposition of Austin E. Barker.
8. Deposition of Carl Myron Wood.
9. Deposition of Kenneth Earl Sutton.
10. Sealed exhibit for impeachment purposes only.

Jury Trial

Timely request was made for trial by jury.

The parties hereto agree to the foregoing pretrial order and the Court being fully advised in the premises.

Now orders that the foregoing pretrial order shall not be amended except by consent of both parties, or to prevent manifest injustice, and it is further

Ordered that the pretrial order supersedes all pleadings, and it is further

Ordered that upon trial of this cause no proof shall be required as to matters of fact hereinabove specifically found to be admitted, but that proof upon the issues between plaintiff and defendant as hereinabove stated shall be had.

Dated this 21st day of January, 1955.

/s/ GUS J. SOLOMON,

Approved:

/s/ NELS PETERSON,

Of Attorneys for Plaintiff

/s/ JOHN GORDON GEARIN,

Of Attorneys for Defendant

[Endorsed]: Filed January 21, 1955.

[Title of District Court and Cause.]

VERDICT

We, the jury, duly impaneled and sworn to well and truly try the above entitled cause, do find our verdict in favor of the plaintiff, and against the defendant, and assess plaintiff's damages in the sum of \$10,000.00.

Dated this 25th day of January, 1955.

/s/ CARL BENSCHIEDT,

Foreman

[Endorsed]: Filed January 25, 1955.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITH-
STANDING THE VERDICT

Comes now defendant and pursuant to the provisions of Rule 50(b) of the Federal Rules of Civil Procedure moves the court for an order setting aside the verdict entered herein on January 25, 1955 in favor of plaintiff and against defendant in the sum of \$10,000.00 and entering judgment in favor of defendant and against plaintiff in accordance with the defendant's motion for directed verdict heretofore interposed herein and which motion was taken under advisement by the trial court.

Upon argument of this motion, defendant will contend that its motion, which was based upon the following grounds, to-wit: (1) there was no evidence that the defendant was guilty of negligence in any particular charged or (2) that any act or omission on the part of defendant constituted a proximate cause of the death of the deceased and (3) that the deceased was himself guilty of negligence constituting the sole proximate contributing cause of his death, was not granted, when under all the evidence there was as a matter of law no liability on the part of defendant.

/s/ KOERNER, YOUNG, McCOLLOCH
and DEZENDORF

/s/ JOHN GORDON GEARIN,
Attorneys for Defendant

I, John Gordon Gearin, one of attorneys for defendant, hereby certify that the foregoing motion is made in good faith, not for the purpose of delay, and that the same is, in my opinion, well founded in law.

/s/ JOHN GORDON GEARIN,
Of Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed January 26, 1955.

In the United States District Court
For the District of Oregon

Civil No. 6787

TERESA E. EASTMAN, Administratrix of the
Estate of Eric Gunner Eastman, Deceased,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant.

ORDER

Defendant's motion for judgment notwithstanding the verdict under Rule 50B of the Federal Rules of Civil Procedure came on regularly to be heard before the undersigned Judge of the above entitled Court on Friday, February 4, 1955. Plaintiff appeared by E. B. Sahlstrom, and defendant appeared by John Gordon Gearin of its attorneys. The Court being of the opinion that the motion for directed verdict made by defendant at the close of

all the evidence in the case should have been granted for the reason that there was no evidence that the defendant was guilty of negligence in any particular charged by plaintiff, and the Court being fully advised,

Now orders that the verdict returned herein on January 25, 1955 in favor of plaintiff and against defendant in the sum of \$10,000.00 be and the same is hereby set aside and held for naught, and

It is further ordered that the defendant have judgment in its favor against the plaintiff.

Dated at Portland, Oregon, this 4th day of February, 1955.

/s/ GUS J. SOLOMON,
Judge

[Endorsed]: Filed February 7, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Southern Pacific Company, a corporation, Defendant, and Koerner, Young, McColloch and Dezendorf and John Gearin, Its Attorneys:

You, and each of you, will please take notice that the plaintiff appeals to the United States Court of Appeals for the Ninth Circuit from that certain Order heretofore made and entered on the 4th day of February 1955, which said order set aside and held for naught the verdict of the jury for the

plaintiff and against the defendant herein, and granted judgment for the defendant in the above entitled action notwithstanding the verdict of the jury in favor of the plaintiff and against the said defendant, and the whole thereof.

Dated this 3rd day of March, 1955.

/s/ ELMER B. SAHLSTROM,

/s/ NELS PETERSON,

Attorneys for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed March 3, 1955.

[Title of District Court and Cause.]

ORDER

Based upon the records and files in this case and the Motion of the Plaintiff, appearing by and through her attorneys, It Is Hereby

Ordered and considered that the Clerk of this Court be and he is hereby directed to forward with the record on appeal the exhibits in this cause to the Clerk of the United States Court of Appeals, 9th Circuit, at San Francisco, California.

Dated at Portland, Oregon, this 11th day of March, 1955.

/s/ GUS J. SOLOMON,

United States District Judge

[Endorsed]: Filed March 11, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Pre-trial order; Verdict; Judgment order dated February 4, 1955; Notice of Appeal; Undertaking for costs on appeal; **Order to forward exhibits to Court of Appeals; Designation of record; Designation of record (2nd); and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 6787, in which Teresa E. Eastman, Administratrix of the Estate of Eric Gunner Eastman, Deceased, or individually as his surviving widow is the plaintiff and appellant and Southern Pacific Company is the defendant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.**

I further certify that the cost of filing the notice of appeal is \$5.00 and that the same has been paid by the appellant.

I further certify that there is enclosed herewith duplicate transcript of proceedings, **January 21, 1955** filed in this office in this cause, together with

exhibits 1-A to I, inclusive; 2-A to E, inclusive; 3 and 4.

In testimony whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 7th day of April, 1955.

[Seal] F. L. Buck, Acting Clerk
/s/ By THORA LUND, Deputy

In the United States District Court
District of Oregon

Civil No. 6787

TERESA E. EASTMAN, Administratrix of the
Estate of Eric Gunner Eastman, deceased, or
individually as his surviving widow,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Portland, Oregon, Jan. 21, 1955, 10:00 o'clock a.m.

Before: Honorable Gus J. Solomon, District
Judge, with a Jury.

Appearances: Messrs. Elmer B. Sahlstrom and
Nels Peterson, Attorneys for plaintiff; Mr. J. Gor-
don Gearin, of Attorneys for defendant. Court Re-
porter: Gordon R. Griffiths. [1*]

* Page numbers appearing at top of page of original Reporter's
Transcript of Record.

Morning Session

The Court: Are the parties ready in the case of Eastman versus Southern Pacific Company?

Mr. Sahlstrom: Plaintiff is ready, your Honor.

Mr. Gearin: Defendant is ready, your Honor.

The Court: Call the Jury.

(Jury empaneled and sworn.)

(Opening statements by counsel.)

The Court: Mr. Sahlstrom, call your first witness.

Mr. Sahlstrom: Plaintiff will call Mr. Lambert to the stand as an adverse party.

Mr. Gearin: Mr. Lambert is not the managing agent. He is not an adverse party under the rules.

The Court: There is a presumption that every witness testifies to the truth unless he has been shown to be contradicted because of his position. We will determine whether a witness is an adverse witness by the way he testifies. If he testifies adversely, we shall permit leading questions. [2]

JEROME LAMBERT

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sahlstrom:

Q. Will you state your full name, please?

A. Jerome Lambert.

Q. Where do you live, Mr. Lambert?

A. I live in El Cerrito, California.

(Testimony of Jerome Lambert.)

Q. By whom are you employed at the present time? A. Southern Pacific Company.

Q. At the present time what is your capacity, job?

A. I am a foreman for the Southern Pacific.

Q. How long have you been at El Centro?

A. It is El Cerrito.

Q. El Cerrito, excuse me.

A. I have been there since October, I believe it is.

Q. Of 1954? A. '54.

Q. Prior to that time where had you been stationed?

A. I have been stationed at Klamath Falls, Oregon, and at Eugene.

Q. For how long have you been employed by the Southern Pacific Company? A. Since 1929.

Q. On or about October 16, 1952, the day of the accident, were you employed by Southern Pacific Company? A. I was.

Q. In what capacity?

A. I was a lead workman.

Q. What is a lead workman?

A. He is assigned to work with, direct, and lead small groups of workers.

Q. At that particular time who was the foreman?

A. Mr. Carl Wood was our direct foreman.

Q. Were you employed in the Southern Pacific Company's repair yards at Eugene on that date?

A. I was.

(Testimony of Jerome Lambert.)

Q. Where are the repair yards?

A. They are located outside the city limits of Eugene perhaps, well, right close to the city limits.

Q. What kind of work is done there?

A. They repair freight cars and adjust loads, various other types of work in connection with freight car repairs.

Q. At that particular time in that yard were all types of cars, of freight cars, then being worked upon?

A. There were a good many, yes.

Q. Would those cars be cars that would come from other states and go into other states?

A. They would. [4]

Q. On October 16 of 1952 were you acquainted with Eric Gunner Eastman? A. I was.

Q. At that particular time for how long had you known Mr. Eastman?

A. I had known him for perhaps twenty years.

Q. How long had he worked there in the repair yards at Eugene, to your knowledge?

A. He had had considerable time in the yards, but he had been interrupted by, for a period of time so that—I can't say exactly, but I know that it would be something like eight or ten years at least.

Q. To your knowledge, when was he first employed by Southern Pacific Company at the Eugene yards? A. I don't really know.

Q. You do not really know.

(Testimony of Jerome Lambert.)

On October 16, 1952, what particular classification was Mr. Eastman in?

A. He was a carman, and——

Q. And as a carman——

Mr. Gearin: Just let him finish, please, Mr. Sahlstrom.

Q. And as a carman are there different classifications?

Mr. Gearin: I object. The witness has not finished his answer, your Honor.

The Court: What else did you want to say? He was a carman and what? [5]

The Witness: And was, it wasn't the particular duty as to operating the mill or a mill machine, or a carpenter he might be called.

Q. (By Mr. Sahlstrom): A mill man is a carpenter, is that correct? A. That is right.

Q. And as a carman are there different classifications of carmen which includes a mill man?

A. There is. It involves a different rate of pay.

Q. What are the main classifications?

A. There are—the larger group are car repairmen who are generally assigned to do general repair work on freight cars in this particular yard. Mr. Eastman had the classification of mill man, and it carried a slightly higher rate of pay.

Q. Was that due to his seniority?

A. To a large degree, yes.

Q. What I meant was, Mr. Lambert, are there other classifications of carmen which would in-

(Testimony of Jerome Lambert.)

clude mill men, upholsterers and inspectors and so forth?

A. Yes, they have passenger carman, for example, and they are all carmen and can be assigned to any work within their classification.

Q. So if I understand you correctly, then, in order to be a mill man you must be a carman, is that correct? [6]

A. That is correct.

Q. Did you see Mr. Eastman on the day of the accident? A. I did.

Q. Approximately what time did you first see Mr. Eastman?

A. On the day of the accident perhaps I saw him at the start of the shift, at 7:30.

Q. Is that the time that he would commence his duties there?

A. That is the starting time; yes, sir.

Q. What was the bulletin time at that particular time, do you know?

A. They started work at 7:30 a.m.

Q. 7:30; all right. Where was Mr. Eastman when you first saw him on that particular day?

A. Probably at his place of work in the mill room.

Q. In the mill, and what kind of tools and equipment was he required to work with?

A. He used carpenter tools generally speaking, which includes, of course, saws, hammers, but he also operated the mill machinery in this mill room

(Testimony of Jerome Lambert.)

which included a cutoff saw, band saw, and planer.

Q. Is that all power-driven machinery?

A. Yes, sir.

Q. What was that machinery used for by Mr. Eastman?

A. It is used exclusively for the work connected with freight cars. [7]

Q. Can you describe just briefly that general type of work?

A. Yes, the floors of flatcars and boxcars required planks for decking. It is used for cutting off correct sizes of flooring or for any other wood-work in connection with the freight cars.

Q. So, as I understand you, Mr. Lambert, then his duties would include working on cars out in the repair yard, doing the general carpenter work on those cars? A. That is right.

Q. Are there various tracks there at this repair yard? A. Yes, sir.

Q. Where is Track No. 15 in relation to the buildings there at Eugene?

A. Track No. 15 is one of two tracks located north of the car repair shed.

Q. What are those tracks used for?

A. They are used for, particularly for running repair work, or any work so assigned by the car foreman.

Q. Approximately just what is the length of the car tracks that are in use?

A. Would you mean in the number of feet?

(Testimony of Jerome Lambert.)

Q. Yes, approximately, if you can give that to us.

A. Well, I would not be able to answer that exactly because any answer I would give might be misleading, but—— [8]

Q. Just give us your best judgment.

A. It would probably hold 30 cars, perhaps, well, each one 40 feet long. That would be just an estimate.

Q. Is a good portion of that area of those tracks covered?

A. Not the two tracks that were in question; no, not the track in question either.

Q. Well, one of the tracks is covered, then; is that right?

A. There are two tracks covered, and the two that—one of these two tracks that you are speaking of is outside of the shed, not covered.

Q. At this particular location of this accident was that beyond the covered area?

A. Yes, it was.

Q. Was it on Track No. 15?

A. That is right.

Q. To your knowledge, were there two cars there that were being worked on, a flanger car and a dump car? A. Yes, it was.

Mr. Sahlstrom: May it please the Court, in the deposition of Mr. Lambert there were several photographs that were referred to. We would like to have them at this time.

(Photographs referred to produced.)

(Testimony of Jerome Lambert.)

Mr. Sahlstrom: There is also one in MacGregor's deposition.

(Photographs produced.) [9]

Mr. Sahlstrom: I would like to have these photographs handed to the witness, your Honor, and identified, if I may.

Mr. Gearin: The identity has been waived, your Honor.

The Court: Any objection to the admission?

Mr. Gearin: No, I do not have any objection to any of the photographs that plaintiff has that have been exhibited to me before.

The Court: All right, you have numbered them 1, a series of photographs. We will number them 1-A, -B and so on.

(Photographs marked Plaintiff's Exhibits 1-A through 1-I, inclusive.)

Q. (By Mr. Sahlstrom): Will you describe for the jury, Mr. Lambert, what a flanger car is, briefly?

A. A flanger car that was referred to is a car that is used for removing snow, primarily, from between the rails after it has been plowed off. It has a body, enclosed body on the trucks, used for the crew to ride in. This body includes the operating mechanism for raising the blades of this flanger, and it also has in it a seating arrangement for the operator, for operators. It has small bay windows on either side for the crew to enable the crew to observe the right-of-way when it is being

(Testimony of Jerome Lambert.)

pulled along the track by the locomotive. It has a stove in for heat. Does that cover it enough?

Q. Yes. Now, I have handed you a series of photographs, Plaintiff's Exhibits 1, and they are marked A, B, C, consecutively. [10] Do those photographs fairly represent a picture of the flanger and the dump car?

A. Yes, there is a photograph of a flanger car here (indicating).

Q. And of the dump car?

A. And of the dump car.

Q. Do those photographs fairly represent the condition of the dump car and the flanger car as it was on the day of the accident?

A. Yes, they do, with one exception. These photographs indicate that the dump car was coupled to the flanger car, which at the time was not the condition. They were separated.

Q. To your best recollection, how far were they separated from each other?

A. I would be unable to say exactly, but a short distance, oh, a matter—well, far enough apart so as to enable the workmen to pass between them.

Q. Would you say two or three feet?

A. Approximately; yes, sir.

Q. At this time, your Honor, may we have the Bailiff hand the photographs to the jury for examination. We offer them in evidence, first, your Honor.

The Court: Yes, they are admitted; but it is a quarter of 12:00 now. Are you finished with your

(Testimony of Jerome Lambert.)

questions? Are you finished with this witness? [11]

Mr. Sahlstrom: No, I am not, your Honor. This will be quite lengthy.

(Discussion off the record.)

Mr. Sahlstrom: I think probably, your Honor, the jury would probably follow the testimony better if they were to see the photographs first.

The Court: All right; we will let the jury look at the pictures right now.

Q. (By Mr. Sahlstrom): Mr. Lambert, I want to hand you Exhibit No. 1-A in evidence and ask you if that is a photograph of a dump car?

A. That would be difficult to say exactly without knowing the number.

Q. Yes, I will hand you B and ask if that number illustrates a view of the dump car involved in this case?

A. That is the number of the car; yes, sir.

Q. Can you illustrate, from Plaintiff's 1-B, which is the flanger car and which is the dump car? Hold it up so that they can see it, if you will, please.

A. The flanger car is the one with the enclosed body. The dump car is the one to the right with the number MW3372 with the mechanism below it.

Q. Referring to 1-F, does that show the steps coming down from the end of the flanger car?

A. Yes, that does show the steps. This is the flanger car, and this is the—— [12]

Q. Would that be a means of getting into and out of the flanger car, up and down those steps?

(Testimony of Jerome Lambert.)

A. Yes, sir.

Q. I hand you Plaintiff's Exhibit 1-B and ask you to point out to the jury the dumping arms of the dump car.

A. The dumping arms that he refers to are this part of the mechanism here (indicating). However, I would not say that the dumping arm is the correct appellation for such, for that part of the mechanism, because——

Q. Describe it in your best terms.

A. Well, because that portion of it operates the locking device on the side door.

Q. Which portion operates the locking device? Point to it specifically and so that the jury can all see.

A. This rod running through here connected with this movable arm right in through there (indicating).

Q. How many of those movable arms are on each side of the car?

A. I believe there are four.

Q. I hand you again Plaintiff's Exhibit 1-G and ask what the photograph illustrates.

A. That illustrates fairly well the locking device. There are a number of them on the same car.

This rod running through here, which is square, connects the four different lever arms that operate the locking device and probably some other mechanism.

Q. You have referred to "locking device." I

(Testimony of Jerome Lambert.)

hand you Plaintiff's Exhibit 1-A. Will you point out to the jury where that locking device is?

A. This illustration of this part of the car shows the upper part of the car body, and the locking device is underneath the car—oh, there is an end lock that does hold the dump door. Now, the door that he refers to so frequently is located along the side of the car. This is an end view, and it is a corner, and the door is on the side, and there is also an auxiliary lock that holds the door tight to keep gravel or any parts of it from spilling out.

Q. Point out that exact lock that holds the door in that position. Point out to the jury; put your finger on it.

A. Well, of course, it is not visible there if there is one. Maybe that one is missing, but, of course, I can't see it anyhow.

Q. As a matter of fact, there was one lock missing, wasn't there? A. Yes.

Q. It had been burned off; is that correct?

A. That is correct, excepting that it is only one of several locking devices on it; yes, sir.

Q. Now, pointing to the exhibit again, how many of the [14] individual locks are there on each side of the door?

A. Besides the ones that are underneath the car and are connected with the lever arm, there is also a locking device that he is referring to here that in some way clamp over the end of this side door. There is a hook arrangement. In addition to that——

(Testimony of Jerome Lambert.)

A. Are there two on each end? That is what I am trying to bring out.

A. One on each corner.

Q. One on each corner? A. That is right.

Q. On each side of the dump car door. Now I hand you 1-C. Does that illustrate the door of that dump car?

A. It illustrates a portion of it fairly well. It is this portion from about here which is the bottom of the car body, and the top of it can be just seen in the corner of the picture, from there to there (indicating).

Q. I hand you Plaintiff's -I, I believe it is, 1-I. Point out the various parts of the mechanism there to the jury.

A. There, to begin with, is the first unlocking device, is this handle arrangement that can barely be seen underneath the car, which has to be arranged properly in the first action before dumping the car.

This handle is accessible from both sides of the car underneath it, and it depends on which way the car is to be [15] tipped that this handle is arranged, so the first thing to be done is to arrange this handle properly which allows it to tip only in one direction.

Q. In order to dump that car to the south, which way would that handle have to be placed?

A. Well, I would not know from the way the picture is. I would not know now which way that handle was to be placed, but it is either pulled and

(Testimony of Jerome Lambert.)

turned one way or the other, which is obvious when you can see it. I mean, you can see the actual mechanism. There is various pipes that operate the dumping device. These pipes through here are connected with the air mechanism. This hose here, for example, runs down to a portion of it and seats this, and this, of course, is another one of the lock lever arms. Perhaps my description is not completely lucid, but it is—that is the purpose of that mechanism anyway, and it is perhaps very difficult to see, but this is the rod, a square rod that operates the lock. It is a hook device underneath the car and is operated by air. It is not done manually at all.

Q. Mr. Lambert, in order to dump this dump car what is the first step to be taken in that operation?

A. There are a number of operations that will have to be—this is the car involved on the left. This is a different type.

Mr. Gearin: May I interrupt, your Honor, to ask a preliminary [16] question of Mr. Sahlstrom.

Do you mean to dump the car or to lower the door?

Mr. Sahlstrom: Well, I will come to that, but I believe, your Honor, it is all one operation; is that not correct, Mr. Lambert?

The Court: Are we getting into the main claim now?

Mr. Sahlstrom: No, we are getting onto the point illustrating how this car would dump, the procedure for dumping this particular car.

(Testimony of Jerome Lambert.)

The Court: Have you gone through all the other photographs?

Mr. Sahlstrom: Mr. Gearin has one photograph I would like to get at this time, your Honor.

The Court: Do you want to offer it?

Mr. Sahlstrom: We would like to offer the photographs only, your Honor, without the language that Southern Pacific Company has added to these particular documents.

The Court: We will do that after recess. This is a good time to take a recess.

Ladies and Gentlemen, we are going to recess, and you are excused until 1:30 this afternoon.

(Noon recess taken.) [17]

Afternoon Session

1:30 p.m., January 21, 1955, trial resumed as follows:

JEROME LAMBERT

recalled, testified as follows:

Direct Examination—(Continued)

By Mr. Sahlstrom:

The Court: Have those pictures been marked now? Mr. Sahlstrom, do you want to ask about the other pictures?

Mr. Sahlstrom: Yes, I do, your Honor.

Q. Mr. Lambert, we have marked Exhibit 2-A. Will you tell the jury what that photograph represents, please?

A. This photograph is a complete side view of the car in question, MW 3372.

(Testimony of Jerome Lambert.)

Q. Handing you Exhibit 2-D.

A. This picture represents the end view of the same car showing the operating—part of the operating mechanism and the control.

Q. When you point to the controls, what are those controls; what do they control?

A. They are air valves operating part of the dumping mechanism, and also there is a cylinder somewhat smaller than this underneath the car that operates the locking device referred to before.

Q. The particular cylinder that you have pointed to, what [18] does that cylinder do?

A. That cylinder is arranged so that it tilts the car after the side door has been opened.

Q. That is the only purpose, then, is to open—is to rock the car over? A. Yes, sir.

Q. It is not to open the door?

A. That is right.

Q. And then Exhibit 2-E, Mr. Lambert, what does that represent?

Mr. Gearin: Just a moment, Mr. Lambert. Before you show that to the jury, we would object to that, your Honor, because it shows the car in a tilted position. There is no testimony in this case and no charge raised that the car itself ever tipped, and so it would be entirely immaterial.

Mr. Sahlstrom: These are their photographs, your Honor, I am only offering their photographs.

Mr. Gearin: I have photographs of everything. I loaned them to Mr. Sahlstrom.

The Court: Objection sustained.

(Testimony of Jerome Lambert.)

Q. (By Mr. Sahlstrom): Just tell the jury, then, what happens when the car is dumped insofar as location of the apron of that car is concerned.

Mr. Gearin: That is objected to, your Honor. There is no charge that the car itself was dumped.

The Court: Is that correct, Mr. Sahlstrom; there is no such charge?

Mr. Sahlstrom: It is our position, your Honor, that the dumping operation——

The Court: Answer the question.

Mr. Sahlstrom: Yes, your Honor.

The Court: There is no charge?

Mr. Sahlstrom: No, it is not correct.

The Court: All right, I do not understand what you are talking about.

Mr. Sahlstrom: That is not correct. The dumping operation is all one continuous operation. It is our charge that the first part of the dumping operation was the dropping of the door.

The Court: What specification? Show it to me.

Mr. Sahlstrom: Yes; No. 4, your Honor; No. 6.

The Court: 4?

Mr. Sahlstrom: 4 and 6 of the pre-trial draft, and in 2, your Honor. In manipulating the dumping mechanism——

The Court: Read the question.

(Pending question read.)

The Court: You mean what happens when you invoke the dumping mechanism?

Mr. Sahlstrom: Yes, your Honor.

(Testimony of Jerome Lambert.)

The Court: I do not see anything wrong with that. The objection is overruled. [20]

The Witness: If I understand you correctly, then you want to know the precise——

Q. (By Mr. Sahlstrom): Now, what happens to the apron when the dumping mechanism is manipulated, the apron—or “door,” I think is the proper way to refer to it.

A. The first operation that takes place is the side door drops down horizontally or parallel with the floor of the car.

Q. And then what happens? What is the next phase of the operation?

A. The next phase is the car tilts, the car body tilts on a fulcrum through the center of the car lengthways.

Q. So that the door, then, becomes an apron next to the ground; the gravel flows all over this apron; is that correct?

A. That is correct. The door is a part of the, on the same level of the floor of the car.

Q. When the door is opened, the door does not drop all the way down the side of the car, does it?

A. It drops to a position level with the floor of the car.

Q. Level with the floor of the car?

A. Yes.

Q. Handing you Exhibit 2-C, what does that illustrate?

A. This picture is similar to the one that was shown before [21] showing the operating mechan-

(Testimony of Jerome Lambert.)

ism under the car which operates, again, the locks under the car, and the hinge where, this arm is hinged at that point in there and also just in the picture, and it is hinged again below.

Q. Now, I want you to go through a step-by-step illustration to the jury of what steps are necessary to make this car door open and perform a complete dumping operation.

Mr. Gearin: May it be understood, your Honor, that my objection goes to the dumping operation because, as I understand it, there is no testimony that the dump car did not turn, turn over, just the door came down, and if I am wrong in that assumption I wish Mr. Sahlstrom would tell me about it.

Q. (By Mr. Sahlstrom): The operation was never completed, was it, Mr. Lambert?

A. Not at that time; no, sir.

Q. Not at that time.

The Court: Do you want to find out from this witness how a dump car normally operates through the whole cycle?

Mr. Sahlstrom: Yes, sir; that is right.

The Court: Go ahead.

The Witness: May I use the picture to illustrate?

Mr. Sahlstrom: Yes.

A. This end view of this car could probably be the best illustration of the process that he refers to.

In normal traveling operation or when a car is not in use there is first of all this cylinder and piston arrangement that you see here, if it can be

(Testimony of Jerome Lambert.)

seen, is pivoted on a pin right in the center of the car, and when—before the—when it is in normal traveling operation, this end of this piston is secured to the side of the car with a pin in such a manner as to hold that side up. The apron on the other side or the side of the car is held in place by this rod that runs across there and is hooked over a slot opposite from the way this piston is attached in such a manner that it holds these doors tight against the car to make a double safety device for to prevent its coming down in transit.

However, the first thing you must do then is to disconnect that. Now, I might say right here that this rod running through with this hook over it is so arranged—there is a pinion at that point there, and when this one is hooked this one automatically comes up because the rod is only just so long and there is no flexibility in it, so when one is hooked the other is unhooked so that in this case the first thing to do would be to decide, of course, which way you are going to want the car tilted or dumped, and there is a similar arrangement on the opposite end of this car. That is another cylinder and piston, another rod through there, so there pistons obviously must be placed in the same position. In normal traveling operation they are fastened opposite each other to [23] make the locking device. So then one of them has to be turned or pivoted, and, like I say, the pivot is there which requires them to be turned around and locked on the side of the car that you wish dumped. Then, of course, this rod

(Testimony of Jerome Lambert.)

through here that holds the side up tight must be both arranged so that they are unlocked. Underneath that car perhaps the next operation would be to see that this lock, this device, is placed in proper working condition, operating position. That is pulled and turned in such manner that it will dip in the direction desired.

The next operation perhaps would be to connect this car—they are equipped with hoses on the end. Now, a part of those are a hose connected to the air brakes of the car which are separate and distinct from the air that operates the dumping device, so the proper hose must be connected to a source of the air pressure. In operation out on the line that would be a locomotive which would supply the air. Where it is standing around then it must get its air supply from another source. In the case in question it was from a pipe line running beside the rails of this track. It can just be seen in this picture, I believe. I believe that there is a pipe right close to the track.

Before the air is turned on it would be wise to take the precaution to see that the valves which are contained in this hollowed-out spot in the end of the car, see that those [24] valves are in proper position so that a supply of air will be—will go into the reservoir of the car. This reservoir is contained in the body of the car in between the center sills underneath the body, a long narrow cylinder, and when that is completely charged, that is, when the air pressure has reached a great enough amount

(Testimony of Jerome Lambert.)

to operate the mechanism, then the operator, the operator would then manipulate the valves on the end of the car when everything was in readiness and by opening the valves in one position, in a certain position I will say, the first thing that happens is, through a series of mechanical actions, this arm begins to operate, and while you cannot see it very good and I am not exactly sure just which one of those are the hook or locks, but I believe it is this part of it right there around this square rod—that turns down in such a manner that the hook is released. That at the same time allows this side door then to be free to drop, and it will drop down level with the floor of the car. It is not forced down; it merely drops by its own force, by gravity.

Mr. Sahlstrom: At this time we will offer in evidence the photographs marked 2-A and 2-C. your Honor.

The Court: Which one did I refuse to admit?

Mr. Gearin: I will withdraw my objection to it, your Honor, so they can all be in.

The Court: All right; they will be admitted. [25]

(Photographs previously marked for identification as Defendant's Exhibits 2-A through 2-E, inclusive, were received in evidence.)

Q. (By Mr. Sahlstrom): Mr. Lambert, is that car referred to and known as a Clark type of dump car?

A. It is.

Q. In your experience as a carman have you worked upon this Clark type of car before the day of the accident?

A. No, I have not.

(Testimony of Jerome Lambert.)

Q. That was your first occasion?

A. Yes, sir.

Q. As a matter of fact, is this an unusual car insofar as this particular yard is concerned?

Mr. Gearin: Immaterial, your Honor. There is no charge we had an unusual type of car.

The Court: What are you claiming for this?

Mr. Sahlstrom: I am claiming, your Honor, that *this* particular car was being worked upon by men that did not have experience with this particular type of car.

The Court: What specification is that?

Mr. Sahlstrom: No. 3 and No. 8, your Honor. In this particular type of car we claim it is a very unusual type of dump car, has very unusual mechanism, and there was no warning given of this——

The Court: Objection sustained. You cannot ask that question. [26]

Q. (By Mr. Sahlstrom): As I understand your testimony, then, there are two different locks that maintain this door in an upright position; is that correct?

A. There are actually, perhaps you could call it three: yes.

Q. Give us their locations, please.

A. The one locking device, of course, is the one referred to frequently as the hook under the car that is operated by these arms. The second locking device that I have reference to is the fact that the side of the car on each end is fastened in opposite direction to the cylinders and pistons of this dump-

(Testimony of Jerome Lambert.)

ing device. The third one, of course, would be this hook arrangement that is placed at the top edge of the door in transit to keep the door snug, which is exactly opposite to those which are secured by the piston arrangement.

Q. There are two locks on the south side of this particular car on the door; is that correct?

A. You are referring to the hook on the rod?

Q. Yes.

A. There are two, but they do not lock on both sides of the car at once. When they are hooked on one side of the car, they are unhooked from the opposite side. They cannot hook all four sides at the same time. They are so arranged that they must—they will only hook over one side of the car at the same time, at one time. They cannot hook both sides with the same rod. [27]

Q. On the south side there were two such hooks with this particular car?

A. There are two hooks; yes, sir.

Q. Is it not a fact that one of those hooks was burned off on this particular car?

A. That is right.

Q. So, as a matter of fact, there was just one hook, wasn't there? A. That is right.

Q. Is it not a fact that in order for this door to open and this dumping operation to commence that you would have to have air hooked up to the car?

A. Yes, sir.

Q. Isn't it also a fact that in order for the door

(Testimony of Jerome Lambert.)

to drop down that there would have to be some air in the car to cause it to start to drop?

A. I believe that is the case; yes, sir.

Q. And are some of those arms, the four arms underneath the car that you have referred to that caused that door together with the air to move so as to drop down?

A. The arm activates the locking device under the car, yes.

Q. And the door itself, then, would not drop down without the arms underneath being operated and there being air in the car? [28]

A. Yes, sir.

Q. On this particular car had there been a bad-order card attached to the car the day of the accident or prior thereto?

A. Yes, there was prior to.

Q. What is the purpose of attaching a bad-order card to this particular car?

A. A bad-order card indicates that an inspection had been made by car inspectors, usually in the train yard, indicating that there is some defect to the car and to instruct the switchman to move the car to the repair tracks where the defect can be corrected.

Q. What was the indication upon the bad-order card on this particular car?

A. I don't recall exactly the wording, but as nearly as I can recall it said, "Bad-order dumps" or "B.O. dumps," which just merely means that in some manner the dumping device was inoperative.

(Testimony of Jerome Lambert.)

Q. Who were the two men that had been working on this car prior to your arrival there to give assistance?

A. The men that you refer to no doubt are Carmen MacGregor and Barker.

Q. Are they both here in court today?

A. They are.

Q. How did it come to your attention that your assistance was needed on this particular operation?

A. They had been assigned to work on this particular car and had made several attempts to find out——

Q. Now, excuse me; just speak from your own knowledge. What was it that caused you to come to give assistance on this particular car?

A. I might say that my association with the men was, on this particular job, started at the beginning of their work on it.

Q. Well, to be specific, did you take them over there to show them what should be done?

A. I may not have taken them over to it as you refer, but I did tell them what we wanted to be done on that car; that they were assigned to work on it and that——

Q. Where were those instructions given?

A. Well, specifically I would not remember, but, of course, it would be somewhere on the repair tracks.

Q. Getting back to the original question, how was it called to your attention that your help was needed on this operation?

(Testimony of Jerome Lambert.)

A. After they had made attempts to find out the cause of——

Q. No, excuse me. Just who came and got you to come over to this job, or how did you happen to know about it?

A. Well, one of the men—I don't recall which one—came down and got hold of me and said that they would like to have me look at it.

Q. I see. Now tell us what you did when you went back over there. [30]

A. When I had an opportunity to get to the car, I walked around it with the intention of discovering what, if anything—any defective condition that I could observe that would cause the car to be inoperative.

Q. What was your understanding as to why the car was inoperative at that time?

A. I had no preconceived ideas.

Q. Then it was a matter of first impression with you to go there and look at the car yourself to determine the defect? A. Yes.

Q. What did you do to locate that hidden defect?

A. To question them as to what operation that they had gone through and made several tentative efforts to find the cause by just observation.

Q. And exactly what did you do?

A. I found what I thought might be the cause of the car not operating properly.

Q. Did you walk over to that particular defect

(Testimony of Jerome Lambert.)

immediately, or did you do some first-hand observing yourself?

A. I observed the car carefully by walking around it and to determine just if that might be the cause or if some other reason was——

Q. What parts of the car did you direct your attention to?

A. The operating mechanism under the body of the car. [31]

Q. So you did not go to either end of the car; you went under the car?

A. I went completely around the car, not under it.

Q. In going around the car, what were you looking for?

A. Any defective condition that might be apparent.

Q. When you arrived there was this air hose that you have referred to hooked up to this particular dump car?

A. The air hose was connected to it, yes.

Q. Then the first thing you did was to go under the car; was that correct?

Mr. Gearin: He did not say that, Mr. Sahlstrom.

Q. (By Mr. Sahlstrom): What was the first thing you did, is what I am trying to find out.

A. The first operation, I will repeat, was to walk around the car to observe the condition of the mechanism.

Q. What was the next thing you did?

A. The next thing perhaps was when I observed the defect, what I considered a defective condition.

(Testimony of Jerome Lambert.)

Q. What defective condition was it that you observed?

A. Since they had operated the air valves and they reported the fact that the car would not operate in a normal manner and they had not discovered what was causing the condition, I did notice that one of these lock-lever arms——

Q. Can you point to the——

Mr. Gearin: Let him finish, please, Mr. Sahlstrom. [32]

Q. (By Mr. Sahlstrom): Point out to the jury the particular arm you had reference to.

Mr. Gearin: You can continue your answer and then point out later if you would like to.

The Witness: I noticed that one of these lock-lever arms that I choose to call it for lack of a better word buckled. Since it was designed to operate in one direction, it had dropped down so that it had a tendency to operate in the opposite direction, which caused the operating arm to prevent any part of it from operating because it would work against itself.

Q. At this time will you point to the particular arm that you have reference to? I believe it is in those photographs.

(Photographs presented to the witness.)

The Witness: If you can see it, this is perhaps one of the best pictures to illustrate. This is the arm. You can see this is the side of the car that has been referred to as an apron, and at other times as the side of the car. It is both. This arm or

(Testimony of Jerome Lambert.)

lever is connected at this point and is—has a pin through it to hold it to turn on it, and there is another pin at that point, at this point this arm is fastened to the car body in such manner that it will turn, and, of course, there is two other points where—this arm is intended, I believe now I am right, to go up, and I am almost positive. It has been two years since I have seen [33] this particular car or one like it, but, as I recall, this arm is intended to move up as this side comes down. That would be the normal way for it to operate, but that arm instead of—had gone beyond that point and was buckled so that it had a tendency to pull down, but it could only go just that far so while the operation of the air by these men had been normally to operate this locking device and it would unlock and then make an attempt to fall down, but it could only open it a very short distance. I would not say how much, but it couldn't come down any further so, seeing that, I thought, "Well, perhaps that is the cause of this side not coming down."

Q. In other words, Mr. Lambert, while you were there the levers operating the air had been turned on so that you could observe that the car door would not come down because that arm was buckled; is that what you mean?

A. That is what I thought was the trouble.

Q. While you were there observing this particular dumping arm, who was manipulating the air so that you could observe that, which one of the two men; do you know?

(Testimony of Jerome Lambert.)

A. Carman Barker was operating the air valve.

Q. It was apparent to you from standing outside on what would be the, I believe geographically speaking, on the south side of the car?

A. Yes, south side. [34]

Q. And that was the side to which you were trying to dump this particular car, wasn't it?

A. Yes, it was.

Q. Then your valves that were being operated by Carman Barker would be on the east end of the car, is that correct? A. That is correct.

Q. That is the end away from and opposite from the flanger car? A. Yes, sir.

Q. Was it necessary for you to go under that car to manipulate the dumping arm, or was it done from outside of the car?

A. In an effort to correct this condition I went under the car, yes, under the car body.

Q. You went under the car body, and what did you do under there, under the car?

A. There happened to be a pick handle lying handy which seemed to serve the purpose I had for it exactly, and I picked it up, and by prying over the truck bolster which can be seen in the picture I was able to pry that arm up. It required little effort, and it immediately raised into position.

Q. As soon as you forced that dumping arm into position manually what happened?

A. The side door or apron dropped down.

Q. The air was on at that time?

A. The air was shut off. It was—the hose was

(Testimony of Jerome Lambert.)

connected, [35] but before I had gone under there Carman Barker had closed the air pressure from the ground supply beyond.

Q. But there was air from the—in the car itself, in the air lines?

A. There may have been some air in their reservoir. However, there was not enough to operate the tilting device on the car.

Q. There was enough air for the door to drop but not enough air for the entire car to dump over; is that what you mean?

A. No, it is not. The side door is not operated, is not forced down by air pressure. It is merely released, and it drops of its own weight.

Q. I see. It is air pressure that releases the locks that allow the door to drop?

A. That is right.

Q. But when you force that dumping arm into position then there is enough air in that car to release the locks for the door to drop down?

Mr. Gearin: We object to that as leading, your Honor. I had heretofore made no objections to his leading questions.

The Court: I am not going to object to leading questions. This witness can take care of himself.

Mr. Sahlstrom: May I have the question, please?

(Last question read.)

The Witness: At this time the lock had already been [36] manipulated. The air lock had already been manipulated and was released so that the door gapped open at the top perhaps a couple of inches.

(Testimony of Jerome Lambert.)

There was not an air pressure to release it after I went under the car. That had already transpired.

Q. What, then, caused the door to drop?

A. As soon as we took the buckle out of these lever arms it allowed it to drop of its own weight.

Q. At that time the two hooks, as you have referred to them on the top of the car on the edge, one was burned off, and one was in an open position; is that right?

A. It had to be to operate.

Q. Yes. Now, at that time when you went under the car it was not your intention to dump that car, was it?

A. It was intended to dump if it would dump. I had no intention one way or the other. I knew that it was possible that it would drop and probably would.

Q. But you were not trying to drop either the door or to dump the car, were you?

A. Not particularly. I was trying to just correct the defect so that it could drop.

The Court: What page of the deposition are you referring to?

Mr. Sahlstrom: I am referring to Page 11.

The Court: What questions are they? Where do they start?

Mr. Sahlstrom: Page 11, top of the page of the deposition of Jerome Lambert. [37]

Q. I will ask you, Mr. Lambert, if you recall we took your deposition on the 30th day of January, 1953. You recall that, don't you?

(Testimony of Jerome Lambert.)

A. Yes, sir.

Q. Referring to Page 11, top of the page, I will ask you if you recall this question and your answer:

“Q. The dumping mechanism was defective, and you were attempting to dump the car; is that right?

“A. No, no.

“Q. Well, tell us about that.

“A. I would say that what we were attempting to do was to make the dump mechanism operative.

“Q. You were not attempting to drop the door of the car at all? You were not attempting to make the dump mechanism work?”

Mr. Gearin: You did not read that correctly.

Mr. Sahlstrom: “Q. You were attempting to make the dumping mechanism work, isn’t that right?

“A. That is right, with this addition, that I was aware that the door might dump.”

Q. (By Mr. Sahlstrom): That is your statement, is it? A. Yes, sir.

Mr. Gearin: There is nothing impeaching about that, your Honor. [38]

The Court: No, the witness testified exactly the same way from the stand here.

Mr. Sahlstrom: Yes, that is my impression, but I wanted to clear it that you were not trying to dump the car over at that time. That is what I wanted to be certain about.

The Witness: No, we were not trying to dump the car.

Q. And when you said that you were attempting

(Testimony of Jerome Lambert.)

to make the dumping mechanism work, just what did you mean by that, to be specific?

A. Since I had been called there to assist these men in making this dumping mechanism operate, that was my whole intention, to correct this, what appeared to me this arm that was buckled or in the wrong position. It was my intention to correct that condition so that the dumping mechanism might work. Later, of course, we would correct any worn parts that might cause it to buckle that way.

Q. Mr. Lambert, before you went under that car and took that pick handle to force the dumping arm into position, did you personally inspect the locks or the hooks on the door, as you have referred to them, before forcing that arm into position?

A. Only a cursory look to see that they were unlocked, yes.

Q. Did you at that time and prior to forcing the dumping arm into position examine that car so that you knew that one of those locks was burned off on the end of the car? [39]

A. That was obvious.

Q. That was obvious. Then you knew that?

A. Yes.

Q. Was it also obvious to you that the other lock on that door was in an open position?

A. As I have said before, it was necessary for it to be in an open position to operate that apron or side in the way we intended it to be.

Mr. Sahlstrom: I move to strike that as not being responsive to the question, your Honor.

(Testimony of Jerome Lambert.)

The Court: Well, you can add that if you want to. I will strike it now. Answer the question: Was it obvious it was in an open position?

The Witness: Yes, sir.

Q. (By Mr. Sahlstrom): And so you knew then, Mr. Lambert, that if you forced that dumping arm that was buckled into position that the door might drop down?

A. No, I would not say I knew that that would happen, but I knew it was possible that it would happen.

Q. Why wouldn't that happen? Why do you say that?

A. Because there might be other defects that would—I may not have hit the right one at that time.

Q. Other defects that might hold the door in position? A. That is right.

Q. Even though you had observed Mr. Barker manipulating the [40] air, you say that this particular dumping arm was the one that was buckled and was keeping the door from coming down?

A. That is right.

Q. At the time you were under this car and you were manipulating this dumping arm what direction were you facing?

A. Well, I was under the car. I was facing the center sill; that is, the center of the car and would you would call the body bolsters of the car but toward the center of the bolster.

(Testimony of Jerome Lambert.)

Q. Geographically, would you have had your back turned to the south and be facing to the north?

A. Approximately, yes.

Q. From where you were under the car you did not observe where Mr. MacGregor was standing or where Mr. Eastman was standing?

A. It was only momentary movement——

Q. I will ask you when you were under the car if you were able to observe at that time where Mr. Eastman was standing and where Mr. MacGregor was standing? A. Not while my back was to them.

Q. That is when you were manipulating the dumping arm, isn't it? A. Yes.

Q. Did you give any warning while you were under the car before you manipulated that dumping arm as to what you were going to do? [41]

A. Not while I was under but just before I went under, yes.

Q. Did you make any statement at all while you were under the car manipulating that dumping arm? A. No, none was required.

Q. And you knew at that time that Mr. Barker, Mr. Eastman, and Mr. MacGregor were all in close proximity, didn't you? A. Yes.

Q. When you dropped that door down to the south, what happened?

A. The door came into position as it was normally——

Q. Just tell me what the next thing was you observed——

Mr. Gearin: Let him finish. You asked him a

(Testimony of Jerome Lambert.)

question. I believe the witness ought to answer it, your Honor.

Mr. Sahlstrom: Is he finished?

Mr. Gearin: I do not think he is.

The Court: I do not know if he is or not. Go ahead. Read back his answer.

(Last answer read.)

The Witness: —intended to do before the car body was to be tilted and dumped the contents. That is the normal operation of that side door, and I believe your intention is to tell this——

The Court: Do not worry about his intention. You just answer the questions. [42]

Q. (By Mr. Sahlstrom): What is the next thing you observed? That is all I want to know.

A. I was aware of what—something had taken place because I turned around and observed Mr. Eastman in a sitting position on the ground.

Q. With relation to the dump car, approximately how far was Mr. Eastman away from that dump car when you first observed him on the ground?

A. Well, this would be just an estimate, but I would say he was about, oh, perhaps six feet from the rail; would be just a guess.

Q. Six feet to the south, do you mean, six feet to the south with relation to the direction east and west, in the dump car, how far would you say the middle of the dump car was to one end or——

A. Approximately midway, perhaps a little closer to the east end.

(Testimony of Jerome Lambert.)

Q. A little closer to the east end. All right; what did you then do next?

A. Immediately, of course, our concern was over a man being hurt in any condition so we——

Q. What did you do? That was the question.

A. Well, I questioned him as to his condition.

Q. What did he say?

A. For the moment he said nothing. He was obviously in a [43] little startled condition, if nothing else.

Q. Was he able to get up onto his own feet or his own power?

A. That I can't say. I couldn't say for sure because immediately one of the boys helped him up.

Q. Who was that?

A. Mr. MacGregor.

Q. Where was Mr. Eastman's hat?

A. His cap was laying on the ground beside him.

Q. Did you examine the cap?

A. Picked it up.

Q. What did you observe?

A. I don't know as I observed anything in particular about it because I was more interested in him than I was in the cap.

Q. Did you see some blood upon the cap?

A. I can't say for sure whether I did or not. I don't recall any right at the moment now, no.

Q. Did you observe any blood on Mr. Eastman's head?

A. Yes. I suppose I looked at it, and it seems

(Testimony of Jerome Lambert.)

to me that it—that there was a slight spot of blood there, but I am not sure that it was then or later that I observed it.

Q. All right. Now, at this time Mr. Eastman was on his feet. After the boys had helped him up, what did you do next?

A. He stood there by himself, and I probably made some solicitous remark, and he replied to the effect that he was all right. [44]

Q. Did he want to return to work in the flanger car right then?

A. Not right at the moment. That was not the next observation he made. It was something to the effect that we had better go down to the—see the nurse. I believe I made that remark at that time or thereabouts and, of course, I don't recall our exact conversation, but he said, he protested going over to see the nurse because he thought he could manage to go back to work and that he should not have been there anyway, a remark to that effect.

Mr. Sahlstrom: I move to strike that as not being responsive. I asked you what you did, Mr. Lambert. What did you do next, not what was said.

Mr. Gearin: It is a part of what took place, your Honor.

The Court: I am not going to strike it. Go ahead.

Q. (By Mr. Sahlstrom): What did you do?

A. So after a few moments and more conversation took place, among the boys, Mr. Eastman and

(Testimony of Jerome Lambert.)

myself, we started toward the repair track office.

The Court: Who is "we"?

The Witness: Mr. Eastman and myself.

Q. (By Mr. Sahlstrom): How far is that office from where this particular dump car was located?

A. I wouldn't know how to give it in a matter of feet or [45] any distance of that kind, but I would say it is just approximately one of our city blocks, perhaps the distance of one of these blocks in Portland. It is strictly a guess, though. I don't know.

Q. How many blocks?

A. A block, I would say.

Q. A block to where the car foreman was?

A. No, not to where the car foreman was but to the car foreman's office on the repair track.

Q. You walked over there with Mr. Eastman to Mr. Wood's office, the foreman's office, first, is that right?

A. That is right, we walked along talking.

Q. What was your purpose in taking Mr. Eastman over to the foreman's office?

A. I was trying to convince him that it was the proper thing for him to take him to see the nurse. We have an emergency hospital on the grounds and also we have in the car foreman's office a first-aid kit. It was my purpose to get him there, and then I would examine his head to see if there was anything that we could for it immediately.

Q. All right, now, did you take him to the foreman's office?

(Testimony of Jerome Lambert.)

A. We went to his office, and I asked him to sit down in a chair while I made out an order, a written order, for him to see the nurse at the emergency hospital.

Q. Was that a prerequisite to taking a man to the hospital? [46]

A. It is not necessary. It can be taken any time, but since we were right on our way there, why, it was the obvious thing for me to do.

Q. Did you examine Mr. Eastman's head at the foreman's office? A. I did.

Q. What did you observe at that time?

A. I observed that he had a small cut on his scalp above his forehead. I think it was not bleeding. There was nothing that I could do to help it.

Q. Did you give any first-aid at that time?

A. There was, in my opinion, no first-aid required.

Q. Then where did you take Mr. Eastman?

A. I walked with him down beside the repair track shed toward the hospital. On the way, why, we passed the mill room where his normal—normally would be working, and he wanted to leave his tools there, and I think he had a hammer with him or something, and he wanted to leave that, which he did.

Q. Where did he want to leave the hammer?

A. In the mill room, the carpenter shop.

Q. Now, going back just a little bit, I will ask you when Mr. Eastman was on his feet over there by the car and you observed his head then if you

(Testimony of Jerome Lambert.)

didn't observe blood in his hair, and I will ask you further if you did not say at that [47] time that you did not want to alarm him but you said, "Well, we must go over to see the nurse." Isn't that correct?

A. I don't believe I understand exactly what you mean.

Q. In your deposition on Page 21 I will ask you——

The Court: Ask him the question first.

Mr. Sahlstrom: Thank you.

The Court: Do not ask from the deposition. If you are going to use it for impeachment, ask the question. He said he did not understand you.

Q. (By Mr. Sahlstrom): My question was whether or not over by the car you observed blood in Mr. Eastman's hair at that time?

A. I believe I told you that I was not sure whether I did or not.

Q. I will ask you if it was not your statement at that time, "Well, we must go over to see the nurse"? A. Yes.

Q. And that was made because you did not want to alarm him; is that correct?

A. Not because I did not want to alarm him, no, that was not the reason; but it is a normal requirement.

Mr. Sahlstrom: If I may, your Honor, I would like to refer to Page 21.

The Court: That is all right now.

Mr. Sahlstrom: Thank you. [48]

(Testimony of Jerome Lambert.)

Q. In the deposition near the middle of the page, Question: "What happened then? Answer: "His cap was lying on the ground, and I looked at his head, and I could see that there was a sign of blood in his hair, and not wishing to alarm him I made no mention of it. I said, 'Well, we must go over to see the nurse.' "

That is your statement, isn't it?

A. Yes, that is probably right, too.

Q. You then walked with Mr. Eastman from the foreman's office over to the first-aid station, is that correct?

A. No, after going by the mill room and leaving his tools or hammer, whatever it was, we continued on in that direction. On the way we passed the office where the car foreman, that is the departmental car foreman, master car repair, have their offices, and I stopped in there to see if our foreman, Mr. Wood, was in, which he was, and called him out and made a report of what had taken place out on the track.

Q. Proceed.

A. And he stepped out of the office and came over to where Eastman and myself were, and he looked at Mr. Eastman's head, and I told him what we intended to do is have him go over to the nurse, and Mr. Eastman said he could go over by himself. He would take care of him himself, handed him the doctor's order, and Mr. Wood agreed with me that he should do so immediately in spite of any protests he might make, and we allowed him to go. [49]

(Testimony of Jerome Lambert.)

I offered to go with him, and he protested that, said he could take care of himself, and there was no reason that I could observe why he should not go, and that was the last I saw of him.

Q. The last you saw him was when he was walking down toward the first-aid station?

A. Yes, sir.

Q. You never went back over there again afterwards to observe his condition?

A. No, I did not.

Q. Did you yourself call a doctor for Mr. Eastman directly after this accident?

A. There was no occasion to call a doctor.

Q. Well, just did you call him; that is all?

A. No.

The Court: He did not call one.

Q. (By Mr. Sahlstrom): Approximately how wide is the dump car door on this particular dump car?

A. I would estimate it to be about, oh, perhaps 30 inches wide.

Q. When that door drops down to a horizontal position, in your best judgment how far would that door be from the ground or the rails?

A. Well, both of those distances would be different because, [50] of course, the height from the rail to the door would be less than from the ground.

Q. Give us both distances, then.

A. Pardon?

Q. Give us both of the distances, in your best judgment.

(Testimony of Jerome Lambert.)

A. I would imagine it would be less than six feet from the ground to the bottom of this dump car body, and the distance from the rail would be less. It would be less the thickness of the tie plus the rail on top of it. That would be perhaps a foot less so less than five feet from the top of the rail to the bottom of the car body. These are estimates now. I don't know exactly.

Q. Do I understand it correctly that when the door is in a horizontal position it would be about four feet, you say, down to the rails, or five feet?

A. No, it would be between five and six feet.

Q. Five and six feet. Thank you.

How far, again, is the first-aid station from where this accident occurred? Give it to us in city blocks.

A. Well, it would be at least three city blocks, I would say.

Q. When you observed Mr. Eastman after the accident, did you observe any eye changes?

A. No, not particularly.

Q. Did you look for any?

A. Well, yes, not specifically, but I observed his whole condition in a glance. [51]

Q. Did you notice that his face was flushed?

A. No, it was not flushed.

Q. Did you notice that his speech was at all incoherent?

A. Oh, no; no, it was not.

Q. Are you the immediate supervisor to Mr. Eastman, or were you?

(Testimony of Jerome Lambert.)

A. I don't know just how you mean that, but I was—the only supervisor that had control of these men was Foreman Carl Wood. I was lead workman delegated to lead and direct these men in this operation.

Mr. Sahlstrom: Your witness.

Cross Examination

By Mr. Gearin:

Q. Mr. Lambert, how long did it take you, can you tell us, from the time you went under the side of the car with that pick handle to work on the arm until the time the door came down?

A. A matter of a minute or not to exceed two minutes or something like that; a very short time.

Q. Where was Mr. Eastman the last time that you saw him before you went under?

A. He was standing beside Mr. MacGregor well in the clear of this car.

Mr. Gearin: I have no further questions. [52]

Mr. Sahlstrom: No further questions. Thank you.

The Court: That is all.

(Witness excused.) [53]

AUSTIN E. BARKER

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

(Testimony of Austin E. Barker.)

Direct Examination

By Mr. Sahlstrom:

Q. State your full name, please.

A. Austin E. Barker.

Q. And your address?

A. 988 West Third, Eugene.

Q. Where are you employed?

A. Southern Pacific Company.

Q. In what capacity? A. Carman.

Q. How long have you been employed by the Southern Pacific Company?

A. Since 1923.

Q. You are employed in Eugene at the present time in the repair yards?

A. At the present time, yes.

Q. On October 16 of 1952 were you employed in the Eugene yards? A. Yes, sir.

Q. Of the Southern Pacific Company?

A. Yes.

Q. What was your job at that time? [54]

A. Carman.

Q. Carman, and do you have any particular classification as a mill man or as an upholsterer or as a car inspector? A. Not at that time.

Q. Do you at this time? A. No, sir.

Q. Were you acquainted with Eric Gunner Eastman, the deceased? A. Yes, sir.

Q. How long had you known him?

A. I don't know exactly.

Q. Approximately, to your best judgment?

The Court: Was it more than five years?

(Testimony of Austin E. Barker.)

The Witness: Yes.

The Court: Proceed.

Q. (By Mr. Sahlstrom): You had worked with Mr. Eastman there in the repair yards; had you not? A. Not with him, no.

Q. You had worked on the same crew; had you not?

A. Do you mean on that particular job?

Q. No, you worked on the same crew of men with Mr. Eastman; did you not? You were all carmen? A. Yes.

Q. On October 16, 1952, and prior thereto you were working on various kinds of cars there in the yard, were you not? A. Yes, sir. [55]

Q. Those cars came from other states and went from Eugene to other states, other different states, didn't they? A. Yes, sir.

Q. You worked upon all kinds of different cars, didn't you? A. Yes, sir.

Q. Prior to October of 1952 had you ever worked upon a Clark type of western dump?

A. What was the question again?

Q. Prior to October 16th of 1952 had you ever worked upon a Clark type of western dump car?

A. I don't know whether I had or not.

Q. Do you think you did, or didn't you?

Mr. Gearin: He said he didn't know.

The Witness: I don't know whether—there ain't very many of them come through.

Q. (By Mr. Sahlstrom): On this particular day

(Testimony of Austin E. Barker.)

What time did you start your work day, what time?

A. Seven-thirty.

Q. What is your best judgment as to the time this accident happened?

A. I don't know exactly. I didn't look at my watch or anything.

Q. Can you tell us approximately?

A. Oh, around 8:30 to 9:00 o'clock, I imagine.

Q. At the time of the accident, prior thereto you had been [56] working on this dump car with Mr. MacGregor, hadn't you?

A. What is that?

Q. Prior to the accident you had been working on this dump car with Mr. MacGregor, hadn't you?

A. I don't understand the question yet.

(Last question read by reporter.)

The Witness: Yes.

Q. (By Mr. Sahlstrom): You know Mr. MacGregor, don't you?

A. Yes.

Q. Tell us exactly what your understanding was as to what you were supposed to do with this particular dump car?

A. We went down there to find out what was the matter with it.

Q. Who was it that hooked the air up to this dump car?

A. I did.

Q. Just the two of you, you and Mr. MacGregor were working on this car at first; is that right?

A. That is right.

Q. What was your purpose in hooking up the air to the car?

A. I had "bad order dumps" on it.

(Testimony of Austin E. Barker.)

Q. You were trying to dump the car?

A. Right.

Q. With what success?

A. We didn't have any success.

Q. Why not?

A. Because it didn't dump right. [57]

Q. Did you apply the levers yourself that would make this car dump after the air was hooked up?

A. Yes, sir.

Q. How far through this dumping operation would the car go?

A. As I remember, it didn't go at all.

Q. Who was it that opened the door locks on the south side of the car? A. I don't remember.

Q. Would it have been either you or Mr. MacGregor? A. Yes, sir.

Q. Do you know of your own knowledge whether or not one of the door locks on the south side of that dump car had been burned off?

A. I didn't notice it.

Q. Did you look? A. What is that?

Q. Did you look to see if it had been burned off?

A. No, sir.

Q. Did you know that the door locks on the south side of that car were either burned off or in an open position prior to manipulation by Mr. Lambert of the dumping mechanism?

A. It was in an open position.

Q. What?

A. The lock was in an open position.

Q. Did you know that at that time? A. Yes.

(Testimony of Austin E. Barker.)

Q. How did you know that?

A. Well, the door was down a little.

Q. You knew after the door fell they had to be in open position? A. No.

Q. Well, then, how did you know that those locks were in open position?

A. Because the door was down a little bit.

Q. I beg your pardon?

A. The door was open just a little bit.

Q. A little bit. In other words, the door was open over a little bit, you mean, from the car itself?

A. Just a little when we started.

Q. So that if there was some manipulation the gravity would cause the door to come down; is that what you mean?

A. Before we started to work it, you mean?

Q. No, after you started working.

A. After we started working it, yes.

Q. You are not acquainted with the particular mechanism of this car, are you? A. No, sir.

Q. That is why you called Mr. Lambert over, isn't it? A. That is right.

Q. Who was it that turned the pistons on the end of this [59] dump car so that the car would dump? A. Mr. MacGregor and I.

Q. Did it take two men for the job?

A. Should be, yes.

Q. Tell the jury how you did that.

A. Took that pin out and swung the piston around.

Q. In other words, the piston on the end of the

(Testimony of Austin E. Barker.)

car hooked up with rubber hoses so that two men could pick the piston up and turn it to either side; is that what you mean?

A. No, sir, take a pin out and swing it around, just swing it.

Q. You have to take the pin out first and then swing it around? A. Yes.

Q. If you swing it around, then is there some portion of that piston that has a ram that comes out of it when the air is hooked up with it that forces the door open?

A. It forces out, yes.

Q. That is what forces the door open, isn't it?

A. Yes, sir.

Mr. Sahlstrom: I would like to have these presented to the witness.

(Photographs presented to the witness.)

Q. At the very bottom of that series of photographs, Mr. Barker, the very bottom of that group, there are some small [60] photographs to illustrate the end of the car where the piston is. If you find a photograph there show the jury where the piston is that you have referred to in your testimony.

A. Right here, above this pin here, swinging around. (Indicating.)

Q. What portion of that piston is it that forces the door open?

A. This is it right here. (Indicating).

Q. When Mr. Lambert was under the car where were you?

A. I was on the opposite side of the car.

(Testimony of Austin E. Barker.)

Q. Geographically, that would be over on the north side; is that right? A. Yes.

Q. At that time when Mr. Lambert was under the car the air was still hooked up with the dump car; was it not? A. No, sir.

Q. It was still hooked up with it, was it not?

A. There wasn't no air in it.

Q. Was the air hose hooked up with the dump car?

A. I disconnected it, but I wouldn't say whether it was right then or just after. No, it was disconnected then.

Q. I beg your pardon?

A. It was disconnected then.

Mr. Gearin: You mean when Mr. Lambert was under the car?

The Witness: Yes. [61]

Mr. Sahlstrom: Q. Prior to that time had you been manipulating the levers on the end of the car that make the air go into the car to dump the car? Had you been doing that?

A. Before that, before we was taking the air out, yes.

Q. That is one of the first things you did there, was to hook the air up with the car; isn't that right? A. The first thing, yes.

Q. Then you worked those levers back and forth to try and make the air go into the car and dump the car; isn't that right? A. That is right.

Q. So there was air in the car then; was there not? A. At one time, yes.

Q. You did not see this accident happen, did you? A. No, sir.

(Testimony of Austin E. Barker.)

Q Did you see Mr. Eastman after the accident?

A. Yes, sir.

Q. Where was he when you first saw him?

A. He was kind of laying on the ground.

Q. Did you help him up to his feet?

A. No, sir.

Q. Who did that?

A. Well, Mr. MacGregor had his hand on him. I don't know how much he helped him.

Q. You heard the door drop; then you came around the car; is that right? [62]

A. That is right.

Q. You were surprised to hear the door drop; is that right? A. Yes.

Q. When you got over there the door had already come down and hit him on the head?

A. That is right.

Q. That is the first you knew about that?

A. That is when I first——

Q. To your knowledge, was the dump car coupled with the flanger car?

A. No, sir, it was not coupled.

Q. Were the air hoses hooked up with the flanger car? A. No, sir.

Q. What is your best judgment as to how far away the flanger car was from the end of the dump car at the time of the accident?

A. Well, we had been walking through there, but I don't know exactly how far.

Q. Would you say two or three feet or thereabouts?

(Testimony of Austin E. Barker.)

A. Oh, around that, I imagine, plenty of room for a man to walk through.

Q. Was there any blue flag placed at either end of that dump car before you started to work on it?

A. The track was flagged.

Q. How far away were those flags from the dump car, approximately?

A. Oh, I don't really know. [63]

Q. You mean the entire track No. 15 for its entire whole length was flagged; is that what you mean?

A. Yes, that is what I mean.

Q. By the blue flag?

A. It had a flag on it, yes.

Q. Did you see the flag? A. Yes.

Q. Were there any flags right immediately near the dump car?

A. Not right close to it I don't suppose.

Q. The only flags that you know about were the ones—

A. On the track.

Q. —that are on the end of the track; is that right?

A. That is right.

Q. How long are those tracks at that point, approximately, in city blocks?

A. Oh, I don't know how long they are.

Q. In your best judgment, how many blocks would it be?

A. Oh, that is hard to guess. I would say 700 feet, seven or eight hundred feet.

Q. Did you observe any barricade or other blocking-off of this particular dump car?

A. This particular one?

(Testimony of Austin E. Barker.)

Q. Yes. A. No, sir.

Q. The area was not blocked off or marked off by flags? [64] A. No, sir.

Q. Had you seen Eastman working on the flanger car? A. No, sir.

Q. You do not know what kind of work he was doing on the flanger car?

A. No, sir, I do not.

Q. You know he was working on the flanger car, don't you?

A. No, I didn't even know if he was working on it.

Q. Did you call the doctor after Mr. Eastman was hurt? A. No, sir.

Q. Are you aware of the company rule No. 4225? Mr. Gearin: That is immaterial.

The Witness: No, sir, I am not aware of it.

Mr. Sahlstrom: Q. You have read your safety rules; have you not? A. Yes, sir.

Q. Do you recall that particular rule?

A. No, I do not.

The Court: I think it would be quite difficult for a person to remember 4,000 rules. You had better read the rule to him.

Q. Yes, your Honor. I think Mr. Gearin has the same rule book, your Honor.

The Court: I do not understand the relevancy. Would you mind telling me? [65]

Mr. Gearin: Yes, your Honor, company rule No. 4225 requires that in the event of accident that a company surgeon——

Testimony of Austin E. Barker.)

The Court: No, no.

Mr. Gearin: I will read the rule to your Honor.

The Court: I know the rule, I am looking at it. Are you going to have testimony here by a physician to the effect that if they had called a physician or surgeon this man would be alive?

Mr. Sahlstrom: No, we are not going to have a physician here.

The Court: The objection is sustained. Do not answer the question. If you bring on testimony of that kind we will let you go ahead. We are not going to let you inject this kind of thing in this trial. Proceed with your next question.

Mr. Sahlstrom: Your witness.

Cross Examination

By Mr. Gearin:

Q. Mr. Barker, while you were out there manipulating the valves for the air mechanism did you give any warning to Mr. Eastman?

A. Yes, sir.

Q. What did you tell him?

A. I told him, "You better get back out of the way. You might get hurt."

Mr. Sahlstrom: Your Honor, we object to that question and [66] ask that the answer be stricken for the reason that it is too remote in time. This is prior to the accident time.

The Court: Read the question.

(Last question read.)

The Court: How long was that before the accident?

(Testimony of Austin E. Barker.)

The Witness: Oh, that was—I couldn't say exactly; a few minutes though.

The Court: Was it less than 15 minutes?

The Witness: Oh, yes, I would say so.

The Court: The motion is denied, and the witness may be permitted to answer.

Mr. Sahlstrom: He has answered, your Honor. The witness has answered.

The Court: I did not hear the answer.

(Last answer read.)

Mr. Gearin: I have no further questions, your Honor.

Redirect Examination

By Mr. Sahlstrom:

Q. Mr. Barker, when you were operating those levers to try and dump that car that was some time before Mr. Lambert came along; isn't that right?

A. Yes.

Q. And after a time you could not dump the car, and then you got Mr. Lambert to come over and help; is that right? A. Yes. [67]

Q. So when you gave this warning to Mr. Eastman that was when you were operating the valves some time before; was it not?

A. That is right.

Q. You gave no warning to Mr. Eastman at all at the time Mr. Lambert was under the car and was trying to bring this door down, did you?

A. No, sir.

Mr. Sahlstrom: No further questions.

Mr. Gearin: Q. You were way on the other side

(Testimony of Austin E. Barker.)

of the car, I take it? A. Yes.

Mr. Gearin: I have nothing further.

Mr. Sahlstrom: No further questions.

(Witness excused.)

The Court: Ladies and gentlemen, we will take a 10-minute recess.

(Jury retired for recess.)

(Thereupon, the following proceedings were had out of the presence of the jury:)

The Court: On the basis of your representation that you will have no medical testimony to show causal connection between failure to comply with rule 4225 on the death of the decedent, Eric Gunner Eastman, I am withdrawing contentions 10 and 11. If you offer to bring in medical testimony showing the relationship, of course, I will let that testimony come in. [68]

Mr. Sahlstrom: I would like to have the right to reserve that point later on in the trial.

The Court: Yes, you may do that.

Mr. Sahlstrom: I may bring him up later on, your Honor.

The Court: I was going to say you might need a different type of pleading. That would not be involved in this lawsuit. Is that not a separate cause of action based upon negligence of the company in failing to provide adequate medical care?

Mr. Sahlstrom: That is one point, your Honor. The other point would have been that his conscious pain would have been reduced had a doctor been

called. His conscious pain and suffering would have been reduced had a doctor been called.

The Court: It is quite remote, and the testimony so far from the witnesses whom you have called indicates that none of them felt that he was seriously injured, neither of these two witnesses. We will reserve the point and take our recess for 10 minutes.

(Recess.)

CARL M. WOOD

a witness produced in behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sahlstrom:

Q. State your full name, please.

A. Carl Myron Wood.

Q. Where do you live?

A. Eugene, Oregon.

Q. By whom are you employed?

A. Southern Pacific.

Q. How long have you been employed by Southern Pacific Company?

A. Nearly 21 years.

Q. What is your present capacity?

A. Car foreman.

Q. What do your duties consist of?

A. Supervising freight repairs, Eugene shop.

Q. On October 16, 1952, what was your job at that time? A. Relief outfit foreman.

Q. You have had a raise, then?

A. Not a raise: just a different position.

(Testimony of Carl M. Wood.)

Q. More authority?

A. No, the authority is about the same.

Q. Where is the mill located where Mr. Eastman worked; where is that located? [70]

A. Just about the center of the car shop shed on—adjacent to Track 18.

Q. What kind of equipment is located in that particular mill where Eastman worked?

A. Electric-powered saws and, let's see, there is a joiner, rip saw, cutoff saw, and band saw.

Q. And his job was pretty well established, was it not? He worked in that mill pretty much of the time; isn't that right?

A. Yes, and also he was on other jobs when his time was not fully occupied as a mill man.

Q. He would go out, for example, and work in the repair yard; is that right, work on cars?

A. Yes.

Q. He worked on all kinds of cars, all types?

A. Yes, I would say all kinds and types.

Q. On October 16, 1952, and just prior thereto his duties at that time were to work on all types of cars, isn't that correct? A. Yes.

Mr. Gearin: You are speaking of Mr. Eastman, are you?

Mr. Sahlstrom: Yes, Mr. Eastman.

The Witness: Along with his mill work.

Q. That and the mill work, too, isn't that right?

A. Yes, sir.

Q. And those cars came from out of the state,

(Testimony of Carl M. Wood.)

came to Eugene, and went to other states, isn't that right? A. Yes, sir.

Q. As a mill man, he is somewhat of a carpenter; isn't that correct? A. Yes.

Q. For example, he would have to do some work in the mill, then walk out to some of the cars, repair the seats and upholstering, and so forth, is that right? A. Yes, sir.

Q. Where would these materials that he would have to use in connection with these car repairs be located?

A. Specifically what materials do you mean, lumber?

Q. For example, if he had to have lumber of some other decking for a car, where was that material kept?

A. Lumber is kept directly across from the mill in a storage—we have a storage there.

Q. Where would his tools be kept?

A. Usually his tools are kept in a drawer in the mill.

Q. Then if he, for example, were working on a car out on Track No. 15 he may have to go back to the mill to get some lumber, some supplies, some tools, go back and forth; isn't that right?

A. Very possibly, yes. [72]

Q. But his particular job is more or less established there in the mill, was it not?

A. Yes, he was listed as a mill man.

Q. It was not necessary for you to tell him

(Testimony of Carl M. Wood.)

every day what to do because his job was established? A. Correct.

Q. I suppose on occasions you would have, though, to refer to some particular work that you wanted to have him work on; is that right?

A. Yes, my——

Q. That would be your job——

Mr. Gearin: Let him finish first.

The Witness: The job might require one or two days to be working in conjunction with his mill work.

Mr. Sahlstrom: Q. He may be working out in the yard on one car for two days?

A. Possibly, yes.

Q. Then again he might work in the mill for perhaps a week without going out to the yard at all, is that right?

A. Yes, if there was a lot of yard work to be done.

Q. But if he was working in the mill he would still be working on materials for repairing these cars; isn't that also correct?

A. Yes, usually.

Q. Do you know who it was that gave some instruction or [73] direction to Mr. Eastman to work on this particular flanger car that he was working on the day of the accident?

A. Yes, it was me.

Q. Do you know about when it was that you had talked to him about working on the flanger car?

(Testimony of Carl M. Wood.)

A. Not the exact day. It was a few days previous, maybe one day previous.

Q. A few days previous to the accident or maybe one day? A. Yes.

Q. So the day of the accident, why, he knew pretty well what he had to do that day?

A. Yes, sir.

Q. When you talked to him about that, you did not specify any particular time he had to work on this flanger car, did you? A. No.

Q. But he could do it more or less with his working with other work, with his other activities; is that what you mean?

A. Yes, when his mill work was caught up, he could work on the other car.

Q. I suppose, then, it was your intention that if he had some work to do on this flanger car he would do that, and if he had some work that came up suddenly in the mill he would do that, too, wouldn't he? [74] A. Yes, sir.

Q. Do you know what kind of job that had to be done to this particular flanger, what it was he had to do out there? A. Yes, I do.

Q. What was it?

A. Well, the flanger had to have the seats moved from one side to the other, and this is for better operation of the flanger.

Q. Do you know what kind of material he would have to use in connection with that work in the flanger car?

A. Oh, I could estimate it for you, yes.

Testimony of Carl M. Wood.)

Q. He would have to use lumber, would he?

A. There would be some lumber involved in making brackets for the seats.

Q. Would he have to do work on that lumber in the mill, for example, too, using the power saws or something like that?

A. Very doubtful.

Q. But he might have to?

A. He might, yes.

Q. At least, that is where the tools were kept, and if he had some work to do on this lumber for a car to fit a piece of lumber into that particular car he would have to go back to the mill, wouldn't he?

A. Yes, if it were necessary. [75]

Q. That would be in his discretion, would it not, to determine whether he should go back to the mill, back to the flanger car, and so forth?

A. Yes.

Q. He would not have to come and ask you about that, would he?

A. Not unless he ran into something that he needed information on that he would ask me.

Q. If he had some problem that came up, he would come and see you about it?

A. Correct.

Q. You did not see this accident happen, did you?

A. No, I did not.

Q. You saw Mr. Eastman after the accident, though, didn't you?

A. I did.

Q. Where was it you first saw him?

A. In the Master Car Repairs Office.

Q. What direction is that from where those particular dump and flanger cars were located, see-

(Testimony of Carl M. Wood.)

graphical direction? A. Geographical?

Q. Not railway.

A. Well, it would be westerly, I would say, toward Portland.

Q. West toward Portland? About how far was that away from the dump car and the flanger car?

A. Well, I would estimate about three blocks, two or three blocks. It might be around there.

Q. Then how far is it from your office, then, over to this hospital unit or this first-aid unit that he was being taken to?

A. Did you say from my office?

Q. Yes.

A. I was not at my office when I saw Mr. Eastman.

Q. Oh, where were you?

A. I was at the Master Car Repairer's Office.

Q. Then how far is it from that point on to this hospital unit?

A. Oh, I would say maybe two blocks, estimate.

Q. When you saw Mr. Eastman for the first time, he was walking with Mr. Lambert; is that correct?

A. Yes, sir.

Q. Did you notice any blood in his hair and on his head?

A. Not at first, no.

Q. Some time afterwards did you?

A. Yes, I asked to inspect his injury.

Q. Where was that? Where did that take place?

A. Outside the Master Car Repairer's office.

Q. What did you observe?

A. Do you want me to describe the injury?

(Testimony of Carl M. Wood.)

Q. Yes, if you will. [77]

A. Well, there seemed to be just a small cut, I would judge an inch and a half long, on the top portion of his head. There was very little blood, and it didn't seem to amount to very much.

Q. Up in the frontal lobe of the head; is that what you mean?

A. I would say about in here is where I observed it.

Q. About in the middle of the head?

A. Yes, a little back from——

Q. The top? A. Yes.

Q. You have seen this particular dump car that caused this injury, have you not?

A. Yes, sir.

Q. Can you estimate for us or give us your best judgment as to how much the weight of the door that dropped down would be?

A. I would hesitate to estimate. If I had——

Q. Give us your best judgment about it.

A. Between two and three thousand pounds; ton and a half about.

Q. After you saw Mr. Eastman did you walk over with him to the first-aid station?

A. No, I did not.

Q. You just observed him walk over there? [78]

A. Pardon?

Q. You observed him walk over there, though?

A. He started out toward the hospital, emergency.

(Testimony of Carl M. Wood.)

Q. About what time was it that you first saw Mr. Eastman directly after the accident?

A. About 9:00 o'clock in the morning.

Q. Then what time was it when you next saw him? A. Oh, about 9:45.

Q. Where was that?

A. At the emergency hospital.

Q. What was the occasion for your going over there at that time?

A. The nurse had phoned over and asked for either——

Q. Well, you cannot say what she said. It was your understanding that you should go over there; is that right? A. Yes.

Q. When you went over there, what did you observe as to Mr. Eastman's condition?

A. Well, Mr. Eastman was sitting on a bench just inside the door of the emergency hospital, and he appeared—he did not appear to understand anything you said to him, and he was talking incoherently, and he was in a more or less relaxed position sitting a little sideways.

Q. Was his face flushed?

A. I did not notice. I couldn't say. [79]

Q. That was at 9:45 about?

A. Approximately, yes.

Q. Did he make any expressions of pain at that time? A. No.

Q. At some later time did he?

A. I didn't see him later, much later after that.

Q. I beg your pardon?

(Testimony of Carl M. Wood.)

A. I didn't see him much later after that, only a few minutes until the ambulance came.

Q. Did you call the ambulance?

A. No, the nurse called it; the nurse did.

Q. Do you know what time the ambulance was called?

A. Approximately 10:00 o'clock is the best I could say.

Q. Did you help Mr. Eastman into the ambulance? A. No, I did not.

Q. Why not?

A. Well, there was an ambulance driver and attendant to take care of him.

Q. Was he unconscious at that time?

A. No, not unconscious.

Q. Had he suffered a convulsion at that time?

Mr. Gearin: I think the witness is incompetent to testify if he knows what a convulsion is.

Mr. Sahlstrom: Q. Do you know of your own knowledge whether or not Mr. Eastman had suffered a convulsion prior to going to the hospital?

A. No, I don't.

Q. Would you recognize a convulsion if you saw one? A. I don't know.

Q. You knew his speech was incoherent?

A. Yes, at that time.

Q. And you noticed that, and did you notice eye changes at all?

A. I did not notice eye changes at all.

Q. Did you look for them specifically or just didn't happen to notice them?

(Testimony of Carl M. Wood.)

A. I did not look specific.

Q. What is your best judgment now as to the time when Mr. Eastman left in the ambulance for the hospital.

A. I said about 10:00 o'clock.

Q. Did you stay with him all that time from 1:45 until 10:00 o'clock?

A. Until the ambulance came?

Q. Yes. A. Yes.

Q. Was he walking about the office?

A. No, he remained sitting on the bench.

Q. Was he covered by a blanket?

A. No, he was in a half-sitting position.

Q. Did he indicate to you that he wanted to go back to work? [81]

A. Right at that time?

Q. Well, at any time. A. Yes, he did.

Q. When was that?

A. When Mr. Lambert brought him to me near Mr. Stockton's office before he was sent to the nurse.

Q. He wanted to go back to the flanger car and go to work? A. He did.

Mr. Sahlstrom: Your witness.

Cross Examination

By Mr. Gearin:

Q. Was at any time Mr. Eastman assigned to do any work in connection with the dump car?

A. Not while under my supervision.

Q. Specifically, on the day he was hired, was he,

(Testimony of Carl M. Wood.)

as far as you know, assigned to do any work on the dump car? A. No.

Q. When you first saw Mr. Eastman when he was with Mr. Lambert what was his physical appearance?

A. He appeared physically okeh.

Q. What is the purpose of a blue flag around railroad cars?

A. Well, to protect workmen that are working on or about cars.

Q. From what? [82]

A. From any—from switching in against cars or working on them.

Mr. Sahlstrom: May it please the Court, this is improper cross examination, beyond the scope of the direct examination.

Mr. Gearin: I understand that, your Honor. It is only for the sake of saving time. I would like to make the witness my own witness for this particular limited purpose.

The Court: Proceed.

Mr. Gearin: Q. What is Track 15 used for?

A. For repair of cars.

Q. What, if anything, do they have around there for any protection that they have on Track 15 against switching engines or other engines?

A. On No. 15 track instead of a blue flag we use the proper red flag, and the switch is locked with the car department locks so they cannot get in with an engine.

Q. In other words, there is no danger at all

(Testimony of Carl M. Wood.)

from any moving equipment getting in there to bother a car where these men are working?

A. Correct.

Mr. Gearin: I have nothing further. [83]

Redirect Examination

By Mr. Sahlstrom:

Q. Mr. Wood, do you know what the blue flag rule is? A. Yes, Rule 26.

Q. Do you have a copy of your agreement with you that sets forth the blue flag rule?

A. No, I do not have it with me.

Q. Do you know if it is stated in this motor car and power department agreement?

A. Yes.

Q. Do you know what the blue flag agreement is in this book, the company rule?

The Court: He says Rule 26.

Mr. Sahlstrom: Within Rule 26 of the Interstate Commerce Commission, but is it also in this particular working agreement?

The Witness: I believe it is. I couldn't swear to it without looking in the book.

Q. Could you locate it?

A. I think I could.

The Court: I do not understand the relevancy of the blue flag rule.

(Discussion between Court and counsel.)

The Court: Let us do the arguing a little later. Are you going to have a witness on the blue flag?

Mr. Sahlstrom: Yes, your Honor.

(Testimony of Carl M. Wood.)

The Court: Do you know where the blue flag provision is?

The Witness: This is not a company rule here. This is the union agreement, is all this is. This is protection of employees according to the union agreement with the company. It is stated all throughout——

Mr. Sahlstrom: It is in your '48 rule, the red book that Mr. Gearin has.

The Court: I still do not understand the relevancy, Mr. Sahlstrom. Are you contending that Mr. Eastman did not know that people were working on this dump car?

Mr. Sahlstrom: Our position is, your Honor, that Mr. Eastman did not know of the particular dangers of this particular car and that they were trying to dump the car at that time and that we will have experts here on proper railway practice for having blocked off the car before working on the car.

The Court: Are those experts who say that if a man who knows people are working on a car, that they should have a blue flag anyhow?

Mr. Sahlstrom: Yes, sir; it is absolutely positive. They must have a blue flag anyway. It is very important.

The Witness: I think that this is incorporated with the company Rule No. 4211. [85]

Mr. Sahlstrom: Q. Is the blue flag rule given there by itself?

A. Yes, it is included in this rule.

(Testimony of Carl M. Wood.)

The Court: Let us hear it.

The Witness: Do you want it complete?

The Court: How long is it?

The Witness: Oh, about a page, I guess.

The Court: Are you offering that, Mr. Sahlstrom?

Mr. Sahlstrom: I would like to have the rule read, your Honor, if we may.

The Court: Go ahead; read it.

The Witness: Do you want me to read 4211?

The Court: Yes.

(Witness then read Rule No. 4211.)

The Court: All right. He has read it. Do you want to ask him any further questions?

Mr. Sahlstrom: I believe Mr. Gearin was asking this question, your Honor. I have not started redirect, your Honor.

The Court: I think you have. You were the one asking him these questions at least. Mr. Gearin had finished.

Mr. Sahlstrom: I thought he had asked the first question. I will proceed.

Q. Do you know of your knowledge if at the time of this accident and at this particular location any blue flags had [86] been placed on the Track No. 15?

A. Well, the proper red flags were in place, yes.

Q. Well, a red flag was placed?

A. This is a repair track, you understand, where the red flag is required.

(Testimony of Carl M. Wood.)

Q. The question was: Was any blue flag placed on Track 15? A. No.

Q. Prior to the accident?

A. Not blue flags.

Q. You heard Mr. Barker testify, or Mr. Lambert testify that a flag was placed about 700 feet up the track from the scene of the accident; is that about right?

A. Well, that is the opposite end of the track. It is locked and flagged, also.

Q. That is the only flag that you know that was located at that particular location? A. No.

Q. What?

A. No. There was one at the end, the same end on which the car was located, too. It is a—the track was locked and flagged on both ends, both ends of the track.

Q. Approximately how far in feet from this particular car were those flags placed?

A. Well, one flag about 50 feet. [87]

Q. That was the end of the track?

A. Yes.

Q. And which end?

A. The Eugene end, east end.

Q. That would be on the east end, and the other flag on the west end of the track, how far away was that?

A. About 700 feet, estimate.

Q. That is just a red flag?

A. Yes, it is.

Mr. Sahlstrom: No further questions.

(Testimony of Carl M. Wood.)

Recross Examination

By Mr. Gearin:

Q. Were the switches locked on both ends of this dump car and the flanger car?

A. Yes, sir.

Q. I mean on the track, at both ends of the track? A. Both ends of the track.

Q. Is it possible under those circumstances to couple onto those cars? A. No, sir.

Mr. Gearin: Nothing further, your Honor.

Mr. Sahlstrom: That is all.

(Witness excused.) [88]

BRUCE MacGREGOR

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. Your name is Bruce MacGregor?

A. Yes; that is right.

Q. Mr. MacGregor, now do I speak loud enough so that you can hear me? A. That is right.

Q. How old are you, Mr. MacGregor?

A. I am 64 years old.

Q. Are you married? A. Yes, sir.

Q. By whom are you presently employed?

A. Southern Pacific.

Q. How long have you worked for the Southern Pacific Company?

A. Twenty—going on 27 years.

(Testimony of Bruce MacGregor.)

Q. Mr. MacGregor, during the time that you have worked for the railroad company how long or what kind of jobs have you had?

A. Well, I am mostly cooking and dishwashing.

Q. Cooking and dishwashing?

A. Well, yes, I do everything. I am a cook and relief outfit.

Q. Are you doing that in Eugene today? [89]

A. Not today.

Q. I mean now and the last week, the week before that?

A. Whenever it goes out I do that, emergency.

Q. What is your job classification?

A. I am classed as a car repairman.

Q. A car repairman? A. That is right.

Q. But you actually work as a relief cook?

A. That is right.

Q. Mr. MacGregor, how long have you worked in Eugene? A. All of it.

Q. All of the 27 years? A. That is right.

Q. In all of those 27 years have you worked as relief cook but under the job classification of repairman?

A. No, I wasn't. At one time I was on a crane working on a relief outfit. Then about 16 or 17 years ago I was put in as a cook.

Q. Mr. MacGregor, during the time over the years that you have worked you have become very familiar with the yards at Eugene; have you not, the railroad yards?

A. Well, not the yards not so much, no, because

(Testimony of Bruce MacGregor.)

I didn't ever inspect it much.

Q. Well, you know where the yards are and you see them all the time, you are around in the yards; are you not? [90]

A. Are you referring to the yards or the repair track?

Q. Let us take both of them; let us take the repair track.

A. Well, I am familiar with the repair track, yes.

Q. Where is the mill room in connection with the repair track?

A. Where was the mill from what?

Q. Where is the mill room from the repair track?

A. You mean any repair track that is there?

Q. Let us take from repair track 15.

A. Well, now, if you wanted to know just where the location of 15 is, it would be, I would say, not over 50 feet from the mill room.

Q. Which direction does the Track No. 15 run?

A. Well, I suppose geographically then, well, that would be east and west.

Q. East and west? A. Yes.

Q. Track 15 runs then east and west, and about how long is Track No. 15 in point of feet?

A. I would say 800 feet.

Q. Eight hundred feet? A. Yes.

Q. Is Track 15 used as a repair track all the time? A. No.

Q. What is it generally used for?

(Testimony of Bruce MacGregor.)

A. Well, it is used for different things. It is used for, [91] just like we were working that day and dumping these cars at the lower end and then for overload or just a——

Q. Just a spare track?

A. For overload and then to store material that comes in from the other end on that.

Q. Mr. MacGregor, did you know Eric Gunner Eastman?

A. He was a good friend of mine, yes, sir.

Q. Did he have a nickname?

A. Yes, we called him Ole.

Q. Ole Eastman? A. That is right.

Q. Did he speak with an accent?

Mr. Gearin: This is immaterial.

A. Well, a wee bit, yes.

Q. He was Swedish; was he not?

A. What?

Mr. Gearin: This is immaterial.

Mr. Peterson: I will ask the question. It really is immaterial.

The Court: What are you trying to show by that?

Mr. Peterson: I want to show his earning capacity and the kind of work that he did which involves his person and character of Mr. Eastman, the decedent.

The Court: You mean that it is harder for a man to get a job if he has a Swedish accent? [92]

Mr. Peterson: Not because of a Swedish accent but because he might have some difficulty, it is part

(Testimony of Bruce MacGregor.)

of the thing that the jury may consider as to his earning capacity. I will withdraw the question. Objection was made to it.

Q. Mr. MacGregor, how long had you known Mr. Eastman prior to October 16th?

A. Oh, 24, 25 years.

Q. Had you worked with him?

A. At one time I have, yes, and then I worked right around where he worked there now—then, I mean.

Q. In October, 1952, were you familiar with his general duties? A. With what?

Q. Were you familiar with his general duties? Did you know the kind of work that he did in October, 1952?

A. Yes, he was in the mill; a mill man.

Q. Did he work in the mill, on the tracks and on cars and do various kinds of work around in the yards of the Southern Pacific Company in Eugene?

A. Well, they will assign you to a job, and they generally keep you busy.

Q. Mr. MacGregor, on October 16, 1952, did you—were you directed to go to a particular job?

A. That is right.

Q. What time did you go to work that morning?

A. Well, I reported for duty, I went into the office and reported for duty I would say about 7:45. The rest of them goes at 7:30, but, you see, I have other things to do first on the relief outfit.

Q. When you first went to work you think it was about 7:45? A. That is right.

(Testimony of Bruce MacGregor.)

Q. Where did you first go?

A. He directed me to go down on Track No. 15 to work with Mr. Barker on the dump car.

Q. You had been over to the dining car first; had you not?

A. That is right, I had to check for ice and stuff.

Q. When you got through over there from your duties as relief cook down in the dining car and came back to the office did Mr. Wood send you over to help Mr. Barker on the dump car?

A. That is right.

Q. How far in point of distance was the dump car from where you saw Mr. Wood?

A. I would say about a couple blocks, two blocks or three.

Q. So then did you walk down Track No. 15 to where this dump car was?

A. Well, I could walk down where it was, yes, not on the track.

Q. When you got down there was there more than one car on Track No. 15?

A. Well, there was more than one car—you mean on the whole track?

Q. Yes, the whole track. [94] A. Yes.

Q. How many cars were there?

A. That I don't know. I didn't count them. I just was going to the one I was assigned to.

Q. When you got there was there another car in the immediate vicinity?

A. Was there what?

Q. Was there another car besides the dump car

(Testimony of Bruce MacGregor.)

right together? A. No, there wasn't.

Q. Was there a flanger car there?

A. There was a flanger there, but it was, it was not together because you could walk in between those.

Q. How close together were they?

A. That I don't know. I didn't notice as to that. You know, you don't notice such things as that, not knowing something is going to happen.

Mr. Peterson: I ask leave of the Court, your Honor, if I might use the blackboard and have Mr. MacGregor just simply draw the location of these two cars so that we get the geographical directions straight. There has been reference to east, west, north, and south, and I do not think it is exactly clear. Is that all right, Mr. Gearin?

Mr. Gearin: I do not care; it is immaterial.

The Court: He says that the flanger was west of the dump car. [95]

The Witness: That is right.

The Court: And that a person could walk in between the two of them, but he didn't know how wide a space. I think there was other testimony that it was three or four feet between the two cars.

Mr. Peterson: Two or three feet, I think that is what the other witnesses said.

Mr. Gearin: I do not see why you need a blackboard for that, your Honor.

Mr. Peterson: I want to show the relationship of the two cars and the point of where the accident occurred so that the jury can follow which side.

(Testimony of Bruce MacGregor.)

The Court: You go ahead and draw a picture.

(Blackboard produced.)

Mr. Peterson: Q. Mr. MacGregor, if I were just simply to mark at the top of this blackboard here the direction east——

A. That is geographical you are talking about?

Q. I am just indicating the top of this would be east. A. All right.

Q. And the bottom would be west?

A. Yes.

Mr. Gearin: Why don't you put north to the top. Then nobody will get confused.

Mr. Peterson: The blackboard is rectangular, and I cannot draw the track where—— [96]

The Court: All right, east and west; proceed.

Mr. Peterson: And over here on the left, north; south on the bottom. This Track No. 15 runs in a generally easterly and a westerly direction; does it not, geographically? A. Yes, geographically.

Q. Does it run in a straight line?

A. What is it?

Q. Is it a straight track or curved?

A. Oh, well, it has got curves in it where they come in, you know. You can't come straight off of a switch.

Q. Could you tell us, is it much of a curve?

A. Well, I don't know, I couldn't tell you that. It is not an angle or like a "Y" or a turntable or anything like that, no. What you are talking about there is where the track is where the cars are?

Q. Yes.

(Testimony of Bruce MacGregor.)

A. Oh, you want where the cars are at?

Q. Yes.

A. No, there was no curve where the cars were at.

Q. In other words, then, if we just draw two lines as though they were a railroad track, these two lines here would be the railroad track?

A. Yes, sir; that is right.

Q. Now, then, there were two cars, two railroad cars sitting on the railroad tracks? [97]

A. No, there might have been more than two cars. You asked me if there was a flanger car on the other end of that track. That track is 800 feet. I don't know how many cars are on the track.

Q. I am specifically speaking of the dump car. I will start with the dump car.

A. There was one dump car.

Q. All right, starting out with one dump car, which direction was the other car from the dump car?

A. It would be west.

Q. West, so the most westerly car was the flanger car?

A. That is right.

Q. The cars extend—the flanger car extends out over the track, does it, on each side of the wheels?

A. Why, sure, I will say they did, yes.

Q. If I will just draw in here very roughly something like that that would represent one car or the flanger car sitting on the tracks?

A. Yes.

Q. Is there a platform at one end of your steps leading down off the flanger car?

A. Is there?

Q. Is there?

(Testimony of Bruce MacGregor.)

A. Sure. I don't know whether it's a platform. It is a place to get down. [98]

Q. Is it your testimony then that immediately west of this flanger car there was a dump car?

A. That is right.

Q. So if I draw another car in there something like that, that would represent the dump car?

A. Yes, yes.

Q. Is that a fair illustration of the location of the cars? A. That is right.

Q. When you arrived there was there a blue flag on either one of these cars?

A. No, not on the cars.

Q. Did you see a blue flag at all on the track?

A. Well, I don't like to work until I know there is one on because that is the first thing we were taught.

Q. I'm sorry. I move to strike his answer.

The Court: Was there a blue flag on that track?

The Witness: It is flagged, yes, sir, flagged.

Mr. Peterson: Q. Was there a blue flag?

A. I wouldn't say blue, they are red, some of them that have men that work on them.

Q. Mr. MacGregor, when you arrived at this dump car can you tell us about what time it was?

A. Oh, I reported—I would say about 7:55.

Q. That is about five minutes to eight?

A. That is right. [99]

Q. At the time that you arrived did you see Mr. Eastman in that general vicinity?

A. No, not at that time I didn't.

(Testimony of Bruce MacGregor.)

Q. At that time whom did you see?

A. I just saw A. E. Barker.

Q. Where was Mr. Barker?

A. He had put—I won't say he had because the air was already in the car when I got there. The hose was connected.

Q. My question was where was Mr. Barker?

A. He was standing at the end of the car.

Q. Which end?

A. Well, it would be the A end.

Q. East end?

A. That would be the east end; that is right.

Q. Where was the air hooked up?

A. On the pipe that runs along the track.

Q. Which end, the east end?

A. That is right.

Q. Or west end; east end?

A. That is right.

Q. Which side of the track, north or south?

A. North.

Q. So that there was air just hooked up to this dump car when you arrived? A. Yes, sir.

Q. That was hooked up to the air alongside the track? A. That is right.

Q. The air, does it not come out the end of the car, and there is a hose that runs out so that it hooks onto an air connection?

A. That is right.

Q. That is the way it was when you arrived?

A. That is right.

Q. Mr. Barker was standing on the east end;

(Testimony of Bruce MacGregor.)

is that correct? A. That is right.

Q. Now, Mr. MacGregor, after you arrived what did you do?

A. I never done nothing the whole time I was there, only walked around to the car.

Q. Walked around the car?

A. That is right.

Q. You mean to say that you walked around the car between the two cars and around it back to the same place?

A. No, I just went off around, around on the side that wouldn't dump. One side wouldn't dump.

Q. When you came from the place of Mr. Wood, that you talked to Mr. Wood, did you approach from the east or from the west?

A. Did I what?

Q. When you came to this dump car did you come down the track from the west or from the east?

A. No, I came up the A end, around the east end. [101]

Q. Around this car?

A. Yes, around where the air was.

Q. So that after you got there five minutes to eight the only thing you did was walk around the car, and that is all you did?

A. Yes, that is all I did at that time, yes, up until he swung the dump car, until he went to the dump car.

Q. About how long was it before Mr. Lambert arrived?

(Testimony of Bruce MacGregor.)

A. Well, we gave—he gave two applications on the car to dump it, and it didn't dump, and I estimate it was about maybe 20 minutes until Lambert was there. Just as soon as he could do that he came over there.

Q. Would that be then about 15 minutes after eight if you arrived five minutes after eight?

A. Maybe it would be longer than that. I didn't look at my watch. I wasn't timing myself.

Q. I understand, but I want to know if you can tell us approximately how—when Mr. Lambert arrived.

A. No, I didn't look at my watch. I don't know. You see, he just came up there, he asked if we was having difficulty.

Q. Mr. Lambert came up and asked if you were having difficulties?

A. That is right.

Q. At the time Mr. Lambert arrived where was Mr. Barker?

A. He was standing there. [102]

Q. Was that on the east end?

A. That's right, that is—

Q. Pardon me?

A. That is right.

Q. You were standing close to Mr. Barker, were you?

A. Oh, I wouldn't say I was standing close. I was standing there. I just don't know the distance.

Q. Did you at that time when Mr. Lambert arrived, did you see Mr. Eastman?

A. Just shortly after he arrived.

Q. Shortly after Mr. Lambert arrived you then saw Mr. Eastman?

A. That is right.

(Testimony of Bruce MacGregor.)

Q. Is that the first time that you had seen him?

A. That is right.

Q. Where did you see him?

A. He came there at the end of the car.

Q. He came to the end of the car. That is the east end of the car? A. Yes, sir.

Q. At that time Mr. Lambert was then present and you were present and Mr. Eastman was present, and that was all of the persons present, is that correct, at the car? A. Yes, sir.

Q. What did Mr. Lambert then do?

A. Well, he commenced to looking for the difficulty. [103]

Q. He commenced to look? A. Yes.

Q. Did he go under the car?

A. Oh, yes—you mean at this time?

Q. I will ask you, what did he do in looking?

A. He looked underneath at the parts underneath there to see if there was anything wrong in there, but he started at the other end to looking——

Q. Do I correctly follow you——

Mr. Gearin: The witness did not finish his answer.

Mr. Peterson: Are you through?

A. Yes.

Mr. Gearin: I am sorry.

Mr. Peterson: Q. Mr. MacGregor, so then do I understand you to say that Mr. Lambert went down to this end and looked at the dump car: is that correct?

(Testimony of Bruce MacGregor.)

A. Well, he didn't just go to that end. He went around the car looking.

Q. Went around the car this way? (Indicating.)

A. Yes.

Q. At the time that Mr. Lambert arrived was the air hose still hooked up? A. Yes.

Q. Did you know that, or was it while you were present that you and Mr. Barker tried to dump this car? [104] A. Was who present?

Q. When you and Mr. Barker, before Lambert arrived did you try to dump the car?

A. Yes, sir.

Q. And it would not dump?

A. That is right.

Q. So that when Mr. Lambert arrived the air hose was connected, and he looked at the car to see if he could find what was wrong with it?

A. Well, Barker went and shut the air off. He walked up and closed the air off.

Q. Was that pursuant to Mr. Lambert's instructions?

A. I was before his inspection; yes, sir.

Q. I think you misunderstood me. Was it before—did Mr. Lambert tell Mr. Barker, "Go and shut the air off?" A. No, sir, he did not.

Q. Mr. Barker just went and shut the air off?

A. Well, sure, because if a man goes under a car with the air on it is no good.

Q. Mr. MacGregor, had you seen this kind of a car in operation before, this dump car?

(Testimony of Bruce MacGregor.)

A. It were a very rare car around this vicinity. I saw one once before; yes, I did.

Q. Did you understand how it operated?

A. Well, I understood how it dumped, yes, I understood that. [105] That is, I knew the way it was supposed to function and dump, yes.

Q. Did you know if—when you went to pull the door, the side door down, when you went to dump it, in other words, you operated a lever so that it came down like that flat, and if you wanted to dump the entire contents of the car you operated another lever, and the whole car, door and car turned up sideways?

A. You didn't need no lever to dump the side door.

Q. No lever to dump the side door?

A. No.

Q. Mr. MacGregor, did Mr. Lambert go underneath the car?

A. You mean while I was there?

Q. Yes. A. Yes, sir.

Q. When Mr. Lambert went underneath the car where were you standing?

A. I was standing with Mr. Eastman.

Q. Where was that?

A. Well, I would say that was about, oh, seven feet from the track.

Q. Seven feet which way? A. South.

Q. Seven feet south of the track?

A. That is right. [106]

Q. And on the easterly end or the westerly end?

(Testimony of Bruce MacGregor.)

A. Well, it wasn't quite the middle of the car. I was just back of the wheels, the trucks, the bolsters.

Q. Just back of the wheels? A. Yes.

Q. Back, you mean west?

A. About a third back, yes.

Q. A third of the way west?

A. Back from the bolsters.

Q. From the easterly end and about seven feet out from the track? A. That is right.

Q. Is where you were standing and Mr. Eastman was standing? A. Yes, sir.

Q. Did Mr. Eastman have a tool in his hand?

A. Yes, sir.

Q. Did he have a tool in his hand?

A. Well, now, I didn't notice if he did. I don't know whether he did or whether he didn't.

Q. When Mr. Lambert was underneath the car did he have a pick handle in his hands?

A. He went and got a pick handle before he went under the car.

Q. So that when he went under the car did he have the pick handle? [107] A. Yes, sir.

Q. Did you know what Mr. Lambert was going to do with the pick handle?

A. Yes, sure, I knew what he was going to do. He went under there because he said, "There is where the difficulty is," he thought.

Q. So that you knew what Mr. Lambert was going to do? A. That is right.

Q. Did you know the condition of the locks on

(Testimony of Bruce MacGregor.)

the east end of the car and the west end of the car, of the dump car?

A. I didn't notice the one on the west end, but I noticed the one on the one he went to pry on to lift up on.

Q. Were you familiar with that car before that day? A. No, sir.

Q. Did you know whether or not there was a locking device? A. Yes, sir.

Q. On the end, on the ends of each, each end of this car and on the south side when it is in that position but up at the top of this door?

A. Yes.

Q. Did you know that? A. Yes.

Q. On that day, and there is a catch up there to catch them? A. Yes, sir. [108]

Q. Do you know what the condition of those catches were on this day?

A. No, I didn't get up there.

Q. Do you know whether or not they were open or closed then yourself?

A. I didn't know; I didn't see them.

Q. Did anyone else tell you as to whether they were open or closed? A. No.

Q. Then when you were standing there with Mr. Eastman did Mr. Lambert have his back turned towards you?

A. Yes, he had his back turned towards me, and he was working under the car.

Q. He had his back to you, and he was working under the car? A. That is right.

(Testimony of Bruce MacGregor.)

Q. What did you see Mr. Lambert do?

A. Well, when he worked under the car Mr. Eastman took about two steps with him, and he had his finger on him, and he was—he had the pick handle in there by that time, was working, had it on his shoulder and came up like that, and this dump was, well, I would say it was eccentric, it was not centered, it was sitting up on this angle or rod, and when he freed that down come the side, and when the side started down he had been under the car, he started to drop, and with the noise, you know, he kind of throwed his head up, and it come down [109] and hit him right on top of the head.

Q. Did Mr. Lambert—was he in full vision of Mr. Eastman?

A. No, I don't think he saw him.

Q. He could not see Mr. Eastman?

A. No, he had his back toward Mr. Eastman.

Q. What did you do when this door came down?

A. What did I do?

Q. Yes.

A. Well, I stood there for a second to see him laying there.

Q. Did you jump back or jump sideways?

A. I had no reasons to. I was in the clear.

Q. You were then seven feet from the track?

A. Yes, sir, just about seven feet.

Q. Mr. MacGregor, did you observe Mr. Eastman when he was on the ground?

A. Did I what?

Q. Did you see him when he was there?

(Testimony of Bruce MacGregor.)

A. Yes, sir, I did.

Q. Sitting or——?

A. Well, it just knocked him kind of down, and I stood there for a minute and watched him. I didn't know what to do. It scared me. It was the first time in all my years I had ever been around an accident like that. And he rolled over and goes to get up, and he had his hat, his hat was laying there in the dirt. I put my hand down on him, on his shoulder, but [110] I didn't help him. He raised up, put his hat on, never said a word to me, and walked over to a flatcar and leaned up against it. I never heard him say a word after it hit him.

Q. Did you see a tool in his hand?

A. No, I did not.

Q. If he had had it, do you know which hand he used to put his hat on, his cap?

A. No, I didn't notice that.

Q. Did he appear to you to be conscious at that time? A. What?

Q. Did Mr. Eastman appear to you to be conscious at that time?

A. Well, he didn't talk. He looked all right. He took his hat off like he always did. He had a habit of scratching his head.

Q. Did he say anything to you?

A. No, he never said a word. I never heard him say a word.

Q. Did you hear him say anything to anyone else? A. What?

Q. Did you hear him say anything to anyone else

(Testimony of Bruce MacGregor.)

at that time? A. No, I didn't.

Q. Did you hear him say anything to Mr. Lambert at that time?

A. No, I heard Mr. Lambert tell him to come on, that he had to go to the hospital.

Q. Did you hear Mr. Eastman say anything?

A. No, they walked away then.

Q. As they walked away do you recall seeing a tool in the hand of Mr. Eastman?

A. No, I didn't see nothing.

Q. A hammer or other tool?

A. No, I saw nothing in his hand.

Q. Mr. MacGregor, during the years that you worked with Ole Eastman was he a good workman? A. Was he a good workman?

Q. Yes.

A. Why, certainly, he was a good workman.

Q. What was the general condition of his health?

A. That I don't know.

Q. Did he appear to be strong and robust?

A. Well, that I couldn't determine. I am not no doctor.

Q. I understand, but did he seem to be healthy to you?

A. Well, he worked. That is all I can say. I don't know about his health. He may have had a heart ailment, cancer, or something. I don't know nothing about that.

Q. Did he work all the time?

A. Well, I don't know, lots of times I am not there, and I couldn't say if he was working then.

(Testimony of Bruce MacGregor.)

Do you mean was he working all the time through the day?

Q. I meant to say was he doing heavy work, heavy manual work, where you have to be healthy?

The Court: Did he look to you like a healthy man?

The Witness: Well, you know, he was a thin man, but you can't tell about a man whether he is thin or not. I don't know about his health. He looked all right to me, yes.

Mr. Peterson: No further questions.

Cross Examination

By Mr. Gearin:

Q. You say that you are on the relief train? Does that relief train go out on anything other than emergencies?

A. Yes, we go out on derailments, slides, and all that.

Q. How often does that happen?

A. Sometimes quite often and sometimes you don't go for a long time.

Q. Is the majority, the major portion of your time spent in connection with the relief train?

A. No, not all.

Q. When you were standing in the clear there with Mr. Eastman before Mr. Lambert went under the car was there anything said to Mr. Eastman about his standing close by there or being in the vicinity?

A. Well, when I went on the other side of the

(Testimony of Bruce MacGregor.)

car I told him to keep in the clear. I was afraid, you know, and this car being only able to dump on one side I wasn't afraid on that side. If it had dumped on both sides then you would have to dump on both sides, but this car could only dump [113] one way.

Mr. Gearin: That is all. I have nothing further.

Redirect Examination

By Mr. Peterson:

Q. Mr. MacGregor, did I understand you to say that when you went around on the other side of the car you, that you told Mr. Eastman to do what?

A. To keep in the clear.

Q. To keep in the clear? A. Yes.

Q. Now, then, did you yourself recognize that this was a dangerous operation?

Mr. Gearin: Object to the form of the question.

The Court: Objection overruled. Proceed.

The Witness: Any car work is dangerous. It is hazardous, any of it. I don't care what it is, you have got them jacked up in the air there with an air jack, and you are underneath there with an air hammer, it is all hazardous.

Q. About how much did this door weigh?

A. That is pretty hard—I would say it weighed——

Mr. Gearin: If you know.

The Witness: ——weighed over a ton.

Mr. Peterson: Over a ton?

A. You know, it is pretty hard to judge even.

(Testimony of Bruce MacGregor.)

Q. What would be your best estimate? [114]

A. How much would I say?

Q. Yes.

A. Ton and a half. Now I am just guessing.

Q. Mr. MacGregor, when that door came down, can you tell the jury the interval of time that it took? You understand my question?

A. No, I do not.

Q. Can you tell and can you estimate the time that it took for the door to come down from an upright position to the point that it was afterwards? A. No, sir.

Q. Would you say that it was as fast as the snap of my finger? (Snaps fingers.)

A. Well, it was bigger than your finger so it might—it would take longer than that because there was a noise. He heard the noise and throwed his head up and he, Jerry, started to, I will say duck down.

Q. Can you estimate that in point of time, in seconds?

A. Yes, it would be, it wouldn't be a minute or not over a minute.

Q. It would not be a minute? You mean 60 seconds?

A. It would not be very long, no. Well, the minute he pushed up and it just come down, that is all, but I can't determine the time, no.

Q. By snapping my fingers, that would be too fast a time? [115]

The Court: Well, it was quite fast anyway.

(Testimony of Bruce MacGregor.)

The Witness: It was fast, yes.

The Court: Did Mr. Eastman know that Mr. Lambert was under the car?

The Witness: Yes, he pushed under after him, he pushed toward him after him, had his finger out pointing to something where he went.

The Court: Was he working on that car?

The Witness: Well, he was not working on it. I don't know whether he was sent there to work or not because I don't assign them.

The Court: That is all.

Mr. Peterson: Q. Mr. MacGregor, when Mr. Lambert turned to get under the car were you standing side by side with Ole Eastman?

A. Well, he may have been a little bit ahead of me, not much, just right here. (Indicating.) I could have touched him with my hand going this way but not going towards the car. That would be west.

Q. Can you tell what Mr. Eastman was pointing at? A. What he was pointing at?

Q. Yes.

A. Well, now, that I can't tell. I can state that he was pointing. He was pointing the same direction in which Mr. Lambert was going.

Q. Did Mr. Eastman say, utter any word or words? [116] A. No, he did not.

Mr. Peterson: You may take the witness.

Mr. Gearin: I have nothing further. May the witness be excused, your Honor?

The Court: You're excused.

Mr. Sahlstrom: I would like to have the wit-

ness stay, your Honor, until the close of the trial.

The Court: Very well. You stay for a while.

KENNETH SUTTON

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sahlstrom:

Q. State your full name, Mr. Sutton.

A. Kenneth Earl Sutton.

Q. What is your address?

A. 1528 North Springfield.

Q. On October 16, 1952, what were your official duties?

A. I was Deputy Coroner of Lane County.

Q. Where were you employed in addition to that?

A. The Coroner's office is located on Springfield, at Bartholomew-Buell Chapel. It is a funeral home.

Q. Your services also include working for the funeral home? A. That is correct.

Q. To the best of your recollection, when did you first receive notice as the Deputy Coroner of the accident that occurred on October 16, 1952?

A. I think it was the afternoon of the day following.

Q. How was it brought to your attention?

A. I beg your pardon?

Q. How was it brought to your attention?

(Testimony of Kenneth Sutton.)

A. Well, the hospital called, and Mr. Blatchley was on duty, and, of course, he immediately informed me, and I started [118] making investigation.

Q. That was the routine, that if a death occurred that your office should be notified; is that right?

A. Well, the Coroner's office investigates every death other than natural ones. That is the duty of the Coroner's office.

Q. Tell the jury what you did then after you received this notice of the death of Mr. Eastman?

A. Well, I immediately proceeded to the Southern Pacific Shops, and there I contacted Mr. Wood who, I believe, was the car foreman, and I don't recall exactly—of course, the first thing we do is we went to find the witnesses, you know, to the accident, and I——

Mr. Gearin: I am going to object to the materiality of all this, your Honor.

The Court: What is the purpose of this testimony?

Mr. Sahlstrom: To indicate, your Honor, what he did in connection with the investigation in determining certain facts from the witness MacGregor.

The Court: MacGregor?

Mr. Sahlstrom: Yes.

The Court: Are you trying to impeach MacGregor?

Mr. Sahlstrom: Yes, your Honor.

(Testimony of Kenneth Sutton.)

The Court: You called Mr. MacGregor. Then you are trying to impeach him?

Mr. Sahlstrom: We called him as an adverse party, your Honor. [119]

The Court: You did not give him any impeaching questions.

Mr. Sahlstrom: May it please the Court, we have laid foundation for an impeaching question in relation to Mr. MacGregor's statement that at the time of the accident the door came down as Eastman walked forward. We are going to show prior inconsistent statement.

Mr. Gearin: Just a moment, your Honor. They have laid no basis. I object to counsel's making statements in front of the jury unless they are directed to the witness.

The Court: This is not substantive evidence.

Mr. Sahlstrom: It is a prior inconsistent statement of the witness, your Honor, MacGregor.

The Court: Just solely for the purpose of impeaching the witness MacGregor?

Mr. Sahlstrom: Yes, your Honor.

The Court: You are trying to discredit his testimony?

Mr. Sahlstrom: We are trying to show that at a previous time he made a different inconsistent statement which is material to our case, your Honor.

Mr. Gearin: He did not lay a foundation when the witness was on the stand.

The Court: You are not contending this is substantive evidence then?

(Testimony of Kenneth Sutton.)

Mr. Sahlstrom: I believe it would constitute substantive evidence, your Honor. [120]

The Court: Since when was Mr. MacGregor authorized by the Southern Pacific Company to make statements on its behalf.

Mr. Sahlstrom: Only as an employee and agent, your Honor. Our point is that he made a different statement entirely about the accident.

The Court: I am going to let you withdraw Mr. Sutton and put Mr. MacGregor back on and lay a foundation and then use Mr. Sutton solely for the purpose of impeachment and not for the purpose of any substantive evidence.

(Witness Sutton temporarily withdrawn.)

BRUCE MacGREGOR

recalled, testified as follows:

Examination

By Mr. Sahlstrom:

Q. Mr. MacGregor, did you have a conversation with Deputy Coroner Kenneth Sutton on the day following this accident?

A. That is right, I made a statement.

Q. Did you have occasion at that time to go with Mr. Lambert and Mr. Sutton to the scene of this accident to show Mr. Sutton the dump car?

A. It was right by the dump car where I talked to him.

Q. At that particular time did you have a con-

(Testimony of Bruce MacGregor.)

versation with Mr. Sutton about how this accident happened?

A. Well, yes, he asked me.

Q. As a matter of fact, he asked you questions about the accident in connection with a report, didn't he?

The Court: I did not hear.

Mr. Sahlstrom: Q. He asked you questions about this accident, as to how it had occurred?

A. They introduced me to him and told me that is what he came here for. I asked him if he was the Coroner. He knew the Coroner well. He says that the Coroner had sent him there. Maybe I should not have done it. I never seen a paper or nothing. He stood there and wrote. Then he walked away.

The Court: Nobody is concerned about that. They just want to ask you about that conversation. There is nothing [122] improper about talking to Mr. Sutton. Proceed.

Mr. Sahlstrom: Q. Did you make the following statement to Mr. Kenneth Sutton, the statement as follows: That you and Mr. Eastman were standing side by side when Mr. Lambert went under the dump car and manipulated the dumping arm that caused the door to come down, and at that time when the door came down you stepped back and got out of the way, and Mr. Eastman did not make it?

A. If I would have said that——

Q. Did you make that statement?

The Court: Did you make that statement?

The Witness: No.

(Testimony of Bruce MacGregor.)

The Court: What did you tell him?

The Witness: I told him that Mr. Eastman walked and that there was two movements made, Eastman going towards Lambert and Lambert ducking down, but I never moved. I didn't have an opportunity.

Q. Didn't you tell him Mr. Lambert was under the car at that time? A. Sir?

Q. Did you tell Mr. Sutton that Mr. Lambert was under the car at the time of the accident?

A. Well, I think I did. I told him how it happened, yes.

Q. That is where he was; isn't that correct?

A. Yes; that is right. [123]

Q. You told him that Mr. Eastman took a step forward or two steps forward?

A. Well, I said one or two steps forward, yes.

Q. As the door came down?

A. No, before it came down.

Q. Before it came down?

A. He wouldn't have time to take two steps when the door came down.

Q. Before the door came down and he was standing there, standing still when the door came down; is that right?

A. Yes, he was standing still.

Q. Did you make any warning to Mr. Eastman at that time.

A. I didn't have time. He heard the noise, and that startled him.

Q. When Mr. Eastman walked forward, accord-

(Testimony of Bruce MacGregor.)

ing to your testimony, did you make any warning to him at that time?

A. I didn't have time. In fact, I was watching Lambert under there. I looked around, and here was Otto going there.

Q. Did you yourself step backward at that time?

A. No, I did not.

Q. Do you deny that you made that statement to Mr. Sutton?

A. I never did that. He may have misunderstood. It was outside there, switch engines and things around there. There was noise.

Mr. Sahlstrom: No further questions. That is all.

Mr. Gearin: I have nothing further, your Honor.

KENNETH SUTTON

recalled, testified as follows:

Direct Examination (Continued)

By Mr. Sahlstrom:

Mr. Sutton, you have heard the testimony here of Mr. MacGregor; have you not?

A. Yes, sir, I have.

Q. I will ask you whether Mr. MacGregor stated to you in your investigation that he and Mr. Eastman——

Mr. Gearin: This is leading.

The Court: You ask him what he said.

Mr. Sahlstrom: Q. Then I will just ask you specifically what did Mr. MacGregor tell you at that

(Testimony of Kenneth Sutton.)

time about where he was standing and where Mr. Eastman was standing?

A. The way I understand it, the way it was told to me by MacGregor, Eastman had gotten down off of this flanger car and walked around to where MacGregor was standing, and they were talking there, and in the meantime while they were standing there Lambert had walked or crawled back under the car for the purpose, I assume, of releasing these dogs or whatever it was that he was going to do under the car, and it was while they were standing together that this door or the side of this car came down, and I am sure that MacGregor said he jumped back out of the way. There was nothing ever said, to my knowledge, about him walking back under the car or walking towards the car, to the best of my recollection. [125]

Q. You never heard Mr. MacGregor say that Mr. Eastman walked forward?

A. I never heard that, no.

Q. Did he make any statement to the effect that he got away but Mr. Eastman did not?

Mr. Gearin: That is leading. He has already related what he was supposed to have said.

The Court: All right, proceed. Did he make that statement?

The Witness: I can't be sure of that, your Honor.

Mr. Sahlstrom: Q. Well, words to that effect?

A. Well, I seem to have the impression. This whole thing is more or less of an impression to me because it has happened sometime ago, and I have

(Testimony of Kenneth Sutton.)

to kind of think back to the thing, you see. I think I do have my report I could refer to, but it is not too specific.

Mr. Sahlstrom: Is that portion of what Mr. MacGregor told you at that particular time clear to you?

Mr. Gearin: Just a moment, your Honor, I think that is an improper question. I object to the form. He has stated it was just his impression; is that correct, Mr. Sutton?

The Witness: I did not hear you.

The Court: I will sustain the objection.

Mr. Sahlstrom: No further questions. [126]

Cross Examination

By Mr. Gearin:

Q. Mr. Sutton, the testimony that you have just given us relating to a conversation you had with Mr. MacGregor is an impression that you had from being out there talking to him in a noisy freight yard, isn't it?

A. Well, I do not quite know how to answer that question. We are not—we talked, and everything was perfectly clear as far as that goes, and I have the impressions of all of these cases that I have investigated. This one is—naturally, I have a picture of everything that has been on these cases, and this is the picture I am trying to bring out now.

Mr. Gearin: Your Honor, at this time I move

(Testimony of Kenneth Sutton.)

to strike the testimony of Mr. Sutton and ask that the jury be instructed to disregard it.

The Court: Do you recall a statement of Mr. MacGregor to the effect that he had to jump back, or is that just an impression that you have?

The Witness: Well, I am sure that he made that statement.

The Court: Did you make any notes of that statement?

The Witness: No, I did not.

The Court: Did you make any notes of your conversation while you were at the yard?

The Witness: Well, I have my report. Shall I refer to that, your Honor? [127]

The Court: Yes, you may refer to your report.

The Witness: To see if there is in there anything that would help.

The Court: Does your report say anything about him jumping back?

The Witness: That is not here, no. That is not on this report.

Mr. Gearin: May I direct another question to the witness?

The Court: Go ahead.

Mr. Gearin: Q. If you will refer to your report that you have there where it says "Form Coroner 3," on the top, "143-C; Name of Informant, Mr. Woods—Car Foreman," does it not?

A. That's right.

Mr. Gearin: I would like to have the Coroner's report received in evidence, your Honor. It is at-

(Testimony of Kenneth Sutton.)

tached to his deposition as an exhibit which is listed and given a number as pre-trial exhibit. I will stipulate, your Honor, that the photostatic copy attached to the original deposition may be used in lieu of the original.

The Court: Any objection?

Mr. Sahlstrom: No objection.

(Photostatic copy of Coroner's report previously marked Exhibit 3 for identification was received in evidence.)

The Court: Is that all? [128]

Mr. Gearin: I have nothing further, your Honor.

The Court: Any redirect?

Redirect Examination

By Mr. Sahlstrom:

Q. Mr. Sutton, in carrying out this investigation which employees did you have your conversations with? A. Which employees?

Q. Yes.

A. I first contacted Mr. Woods, I am sure, and then we went out to locate these other two fellows which were Lambert and MacGregor, I am sure.

Q. Did you go out there to the train yards where the dump car was at that time located?

A. Yes.

Q. Did they point out to you at that time the particular car and the various portions of mechanism? A. Yes, they did.

The Court: There is no dispute about that. This

(Testimony of Kenneth Sutton.)

is not proper redirect. Ask him any questions you want to about the conversation.

Mr. Sahlstrom: Q. I would like to ask you if you will recall now as best you can as to the specific conversation that you had with Mr. MacGregor as to the position that he was standing and the position that Mr. Eastman was standing, the conversation itself rather than your impression. Will you do that? Tell us in your own words what you recall as having [129] been said by Mr. MacGregor at that time.

A. Well, that is kind of hard to do over a period of time thinking back exactly what was said, but I still have this idea in my mind, and if I was rewriting this report I would state that very definitely, that they were standing talking together, and that Eastman had just gotten down off of this flanger car and walked around to talk to MacGregor, they were both standing together. No mention was made of him walking under the car.

Q. What specifically, to the best of your recollection, was said by Mr. MacGregor as to his having gotten out of the way or words of that effect?

A. Well, it is like I said. I can't remember the exact words, but I still have the picture in my mind that he had to get out of the way.

Q. That is the conversation that you are referring to with Mr. MacGregor?

A. A conversation, I can't recall the words, no, sir, but an idea so that they were both standing there together, and he had to get back out of the

(Testimony of Kenneth Sutton.)

way. You see, that is what I mean by it. The conversation would be hard for me to recall.

Q. We do not expect you to remember exact words, but that is your best recollection of what was said? A. Yes.

Mr. Sahlstrom: I think we might have this death record introduced by this witness. [130]

(Document referred to marked Plaintiff's Exhibit Number 2 for identification.)

The Court: Is there any question about the fact that Mr. Eastman died?

Mr. Gearin: No, it is admitted that he died.

The Court: What is the purpose of this exhibit?

Mr. Sahlstrom: A report of his death.

Mr. Gearin: It is admitted he died.

The Court: Objection sustained.

(Exhibit rejected.)

Mr. Sahlstrom: No further questions. [131]

ROBERT J. MARTENS

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. Your name is Robert J. Martens?

A. Correct.

Q. How old are you, Mr. Martens?

A. Forty-nine the second day of March.

Q. Are you married? A. Yes, sir.

Q. Where do you live?

(Testimony of Robert J. Martens.)

A. 952 West Sixth Avenue, Eugene, Oregon.

Q. What is your present employment?

A. Car inspector of Southern Pacific Company.

Q. How long have you been employed by Southern Pacific Company?

A. Seventeen years, 11th day of November, 1937.

Q. Mr. Martens, have you been continuously employed in Eugene, Oregon, for the Southern Pacific Company? A. Yes, sir.

Q. Are you familiar with a dump car that is commonly known as a Clark type western dump car?

A. I have some knowledge of it, yes, sir.

Q. I wonder if the witness might be shown the pictures and [132] I approach the witness, if I may, your Honor, and handing you what has been marked Plaintiff's Exhibit 2-A I will ask you that you hold it up so that the jury might see what we are referring to. Hold it up so that the jury might see, in this fashion with your left hand. Is that a side view of a Clark type dump car?

A. Yes, sir.

Q. In your job as a car repairman——

Mr. Gearin: Inspector, he said.

Mr. Peterson: ——Inspector, have you inspected that type of dump car?

A. I have inspected that type and all other types of passenger and freight equipment.

Q. Have you yourself repaired that type of dump car?

A. Years ago I have, yes, made repairs to them.

(Testimony of Robert J. Martens.)

Q. Mr. Martens, would you tell the jury what is the significance of the blue flag rule, the blue flag safety rule?

Mr. Gearin: Objected to on the ground of competency, your Honor. It speaks for itself.

The Court: We are going to hear it. Go ahead. Is that to tell people that the car is being worked on?

The Witness: Yes, sir, that is one of the requirements, and it is mandatory under the Interstate Commerce Commission and the transportation Rule 26 of the Southern Pacific Company, and it is also Rule 48 of the Motor Vehicle and Car Department [133] agreement which is negotiated between the labor organizations and Southern Pacific Company. That is mandatory.

The Court: Proceed.

Mr. Peterson: Q. Is that a safety rule designed for safety of railroad workmen?

A. That is the primary purpose.

Mr. Peterson: May we have this marked?

The Court: What is that for?

Mr. Peterson: To introduce in evidence as Rule 48, your Honor.

Mr. Gearin: May I suggest that the union contract go in if the witness reads the rule into the record. I do not think the rule is material, a contract of labor is material to this proceeding.

The Court: I am just letting him make his record at this point. I am not submitting it to the

(Testimony of Robert J. Martens.)

jury. I think it is absolutely immaterial myself. I am merely making the record.

The Witness: Do you wish me to read it, your Honor?

The Court: Go ahead.

The Witness: It is under caption: Protection of Employees, Rule 49, and you drop down to paragraph E:

"Employees required to work under cars or locomotives will protect themselves with proper signals. When the nature of the work to be done requires, locomotives and passenger [134] train cars will be placed over a pit if available.

F. "Trains or cars while being inspected or worked on by train yard employees, will be protected by blue flag by day and blue light by night, which will not be removed, except by the workmen placing same."

Same thing as Transportation Department Rule 2031. That refers to the Southern Pacific Company Transportation Rule 26.

Q. Mr. Martens, what is the usual and customary method of repairing or putting in operation of a dump car of the type involved here when the arm is inoperative so that the door will not come down?

A. Well, the first requirement of any employee before going to work on or about cars is to know that the car, track or locomotive have the proper signals displayed which has just been read to you, a blue flag by day and a blue light by night, and we

(Testimony of Robert J. Martens.)

note that in Transportation Rule 26 which requires that the tracks be locked for the protection of the employees.

That takes care of your general practice in the operation before repairs are made to either engines, locomotives on repair tracks and in the roundhouse. The next step then would be in this particular case, in which I worked on the repair track from 1937 to 1941 and repaired cars of the K and J type which is also a dump car, we used small standees something like a railroad sign which said, "Danger, keep out." They were all placed four corners beyond the car to keep that place restricted from the area in which those cars may be dumped.

Q. Mr. Martens, are there locking mechanisms on this kind of a dump car?

A. There are, yes, sir.

Q. So that the door cannot come down?

A. Yes, sir, that is right, the top at each end of the car on each side.

Q. What is the usual and customary method in respect to those if you are going to manipulate the mechanism that would cause the door to drop when there are other workmen about?

A. You mean the air mechanism before I do that?

Q. Yes.

A. I would see that these locks are in proper place secured because if you didn't I would jeopardize myself or any other repairman or other employees if I failed to do that.

(Testimony of Robert J. Martens.)

Q. If the mechanism, locking mechanism is on—if one is burned off one end and the other is in an open position, is the door, is it in such condition that it could come down?

A. It is free by the force of gravity to drop.

Q. If the locking mechanism on each end of the car were not burned off but were actually there and the other one were actually there on the opposite end, and if they were locked or [136] in a closed position, could the door come down?

A. Not if they were in proper position the door couldn't come down.

Q. Mr. Martens, do you know where the mill room is in relation to Track No. 15?

A. It is just outside the shed or adjacent to the repair track 18-19, I would say, is on the north side and on the south side of Track 15.

Q. Mr. Martens, were you over to Track No. 15 to look at the dump car No. MW3372 on the night of October 16, 1952?

A. After I had completed my duty of assignment, I proceeded to the repair track to look at this particular car.

Q. When you arrived that evening was it after dark?

A. Yes, sir, sometime after 11:00 p.m.

Q. Would you tell the jury whether or not those pictures accurately portray what you yourself saw on that evening?

Mr. Gearin: There is no question about that, your Honor. They are in evidence already.

(Testimony of Robert J. Martens.)

The Court: That has been answered already. It has been admitted that the pictures accurately portray the conditions as they existed at the time of the accident.

Mr. Peterson: Your Honor, if counsel so admits that I will not ask the witness any further questions.

The Court: That would be the only basis upon which they could have been admitted in evidence.

Mr. Peterson: Mr. Martens, does one of those pictures show the car coupled together to the flanger car?

A. Yes, this picture here that I have definitely shows that the flanger and the S.P. and S. MW3372 are coupled together through the coupler mechanisms.

The Court: The fact that they are coupled together the night after does not mean that they were coupled together the day previous, and there is no presumption of that and no inference can be drawn from that picture. The jury is instructed to disregard that statement. Proceed.

Mr. Peterson: Q. Mr. Martens, is it good railway practice in railroad practice and repair of a bad order dump car to manipulate an arm in such a way that the door can come down when there are workmen in the immediate vicinity?

Mr. Gearin: That invades the province of the jury, your Honor. The witness is not qualified; calls for a conclusion.

The Court: I do not think there are sufficient

(Testimony of Robert J. Martens.)

facts in the first place to sustain an objection on that ground. This car, the testimony was, could not have been—the locks could not work because the door was partially down. That is the testimony. That is Lambert's testimony, that you could not lock that car, and this was not a car in perfect condition. This was a car that needed repairs.

Mr. Peterson: I will rephrase the question.

Q. Mr. Martens, assume that on this car which you have a [138] picture on one end the lock on that type of car was burned off, and the other lock was in an open position. Would it be good railroad practice under those circumstances to manipulate the operating mechanism of the arm underneath when there are workmen in the range of a falling door?

Mr. Gearin: Objection, your Honor. There is no testimony in the record that at that time there were any men within range. They were all in a safe place at that time, and for the same grounds as assigned to the last question.

The Court: Objection sustained.

Mr. Peterson: Q. Mr. Martens, what is the significance of air being in a car? Why is it—how is air used in the operation of this device?

A. Well, it is a source of power to operate the mechanism of both the pistons beneath the car and on the side. It is your only source of power.

Q. When that power is, when it is hooked up, how is the motive power used? How is it turned on?

A. It is used by a control valve on the end of the car to be operated from either side of the car across

(Testimony of Robert J. Martens.)

your coupler which is maintained in the center of the car, but if you want to tip one direction, why, you would raise the lever up out of the safety device and then move it over, place it in the other one in order to tip that way, and, of course, if you wanted to reverse direction you would do the opposite; you [139] would move to the left.

Q. Mr. Martens, there has been some reference to a piston on each end of this dump car. I wonder if you would hold it up so that the jury knows what I am going to ask you. Now, is that the piston that is located on the end of this dump car?

A. That is correct.

Q. Would you point out the piston?

A. Right here. (Indicating.)

Q. If you intend to dump that car door to the south what do you do with the piston?

A. I will have to assume this is the side.

Q. All right.

A. That piston would be placed in that position so as it would operate out this way. (Indicating.)

Q. How is that piston placed in that position?

A. By a pin.

Q. When it is placed in that position and you intend to dump it there does that person have to disconnect this locking mechanism that is on the top?

A. This one here on the top would be operated by hand.

Q. I am not sure that the jury sees what I am

(Testimony of Robert J. Martens.)

asking you. Is the locking mechanism on the top of this car, is it manually operated, by hand?

A. It can be operated manually, but you have this rod coming over that would operate it by air.

Q. So that if a person wanted to dump to the south he would [140] move this piston over in that position and then use air on it?

A. That would be the source of your power, sir.

Q. If you wanted to lock this, keep this door from opening, what would you do with this lock up at the top?

A. See that it is properly secured; then move your cylinder.

Q. I did not hear you.

A. It should be properly locked, and then move your piston. It would be automatic in there, but you would have to see that it was secured.

Mr. Peterson: You make take the witness.

Cross Examination

By Mr. Gearin:

Q. Mr. Martens, why did you go out there after your tour of duty to look at this car?

A. Mr. Eastman was one of the first employees I worked with on the 11th day of September, 1937. I had been in very close connection with Ed. I would say he was a very intimate friend of mine, and when I heard of the accident I proceeded over to the repair track in order to take a look at the type of car. And, then, of course, I had known that night he died.

(Testimony of Robert J. Martens.)

Q. You went over there because of your friendship for the deceased? A. That is right.

Q. Mr. Sahlstrom is your personal attorney; is he not? Isn't he your attorney? [141]

A. In what manner? I have had two or three attorneys, sir.

Q. He has been one of them?

A. Mr. Sahlstrom has acted as counsel for me; yes, sir.

Q. Your testimony with regard to this type of car, is that based upon all types of dump cars or upon your inspection and examination and working with this particular type of dump car that was here involved?

A. Your Honor, I just don't quite understand.

The Court: Repeat the question.

Mr. Gearin: I will rephrase the question.

Q. Your testimony about the working of these dump cars, is that based upon all types of dump cars, or is it based upon the Clark type?

A. That is a Clark type, sir.

Q. How many of them have you seen?

A. Clark types?

Q. Yes, sir.

A. When I first started railroading, sir, I used to see them quite frequently. In the last 20 years that is the first one I have seen.

Q. That was the first one you had seen in 20 years? A. Yes, sir.

Mr. Gearin: That is all. [142]

(Testimony of Robert J. Martens.)

Redirect Examination

By Mr. Peterson:

Q. What was the condition of health of Mr. Eastman prior to October 16, 1952, as you observed it?

A. What did you say? I did not hear.

Q. What was his condition of health?

A. I would say he was in good health.

Q. One further question concerning the car itself. If the air hose had been hooked up, this car, the air hose was hooked to a connection so it could get air into it and operate a couple times and then disconnect it, would there still be motive power in the car or some part of it so as to—when this piston is put into position that the air motive power functions?

A. It would depend upon a control valve like that. You have—if the air had been connected to it that air could leak through the reservoir to the control valve. It is possible, yes, sir.

Mr. Peterson: No further questions.

Mr. Gearin: That is all.

(Witness excused.) [143]

TERESA EASTMAN

called in her own behalf and in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sahlstrom:

Q. State your full name, please. State your name

(Testimony of Teresa Eastman.)

for the jury, please. A. Teresa Eastman.

Q. What is your address, Mrs. Eastman?

A. 708 West Fourth, Eugene.

Q. What city? A. Eugene.

Q. How long have you lived at that address in Eugene?

A. This is starting the 28th year. In March it will be 28 years.

Q. Where were you born?

A. I was born at Sulpher Springs. It is a small place about 20 miles from Gardiner in Oregon.

Q. In Douglas County?

A. In Douglas County.

Q. At the time of the accident on October 16, 1952, how old were you? A. In 1952?

Q. Yes. A. I was 61 years old. [144]

Q. At this time how old are you?

A. I am 63 the 4th of April.

Q. What is your birth date?

A. The 4th of April, 1954, I was 63.

Q. Had you been married prior to having married Mr. Eastman? A. Yes.

Q. To whom? A. To Louis J. Kolker.

Q. When did Mr. Kolker pass away?

A. In 1946.

Q. What business was he in in Eugene?

A. He passed away on the 19th of August, 1946.

The Court: What was his business during his lifetime?

The Witness: He was in the grocery business.

(Testimony of Teresa Eastman.)

Mr. Sahlstrom: Q. You made your home in Eugene?

A. And he also worked in a hardware store in Eugene for years before I met him.

Q. Do you have some difficulty in hearing, Mrs. Eastman? A. What is it?

Q. Do you have some difficulty in hearing?

A. Yes, I do. My right ear I don't hear well out of.

The Court: Why don't you ask leading questions. This does not involve liability?

Mr. Gearin: I have no objection.

The Court: Proceed. [145]

Mr. Sahlstrom: Q. What is the condition of your eyesight at this time?

A. I use one eye, my right eye.

The Court: I do not think that is material. You had better confine yourself to the issues involved in this case.

Mr. Sahlstrom: Q. What date were you married to Eric Gunner Eastman?

A. On October 25, 1949.

Q. Where? A. In Eugene, Oregon.

Q. At the time of Mr. Eastman's death how old was he?

A. He was 57. He would have been 58 had he lived until December that year. December 26th was his birthday.

Q. You and Mr. Eastman made your home at 708 West Fourth, in Eugene, is that right?

A. What is it?

(Testimony of Teresa Eastman.)

Q. You made your home at 708 West Fourth in Eugene; is that right? A. Yes.

Q. Do you own that house? A. Yes.

Q. Approximately how much were Mr. Eastman's earnings while employed by Southern Pacific Company?

A. Well, it was around either 300 or more.

Q. Each month? [146] A. Yes.

Mr. Gearin: Mr. Sahlstrom, I will stipulate to that, that whatever is shown on his income tax returns I will stipulate he earned through the company.

Mr. Sahlstrom: In the year 1951 the return shows he earned for Southern Pacific Company the sum of \$3762.13, and up until the time of his death in October 16, 1952, he earned a total sum of \$3025.83.

The Court: About \$300 a month.

Mr. Sahlstrom: Q. Do you have some income from the teaching of piano lessons?

A. What is it?

The Court: That is immaterial.

Did your husband support you?

The Witness: Yes, he did.

The Court: He supported you?

The Witness: Yes, he did.

The Court: And he was the type of man who saved his money and brought home his check?

The Witness: He brought his check home and paid the bills, all the household bills.

The Court: He was a good husband?

(Testimony of Teresa Eastman.)

The Witness: Yes, he was.

Mr. Sahlstrom: Q. Did he spend all of his pay check for the family expenses? [147]

A. For anything around the house and anything that was needed.

Q. Did he also spend some money for the repairing and alteration of his house?

A. Yes, he did, he had the whole house redecorated, new light fixtures, everything put in.

Q. Do you know how much that cost, approximately? A. What is it?

Q. How much did that cost, do you know, approximately?

A. What he paid for the redecorating the house?

Q. Yes.

A. \$350, when we were first married.

Q. Was all the money that he brought home from his pay check every month spent for your family expenses?

A. He paid all family expenses.

Q. When did you first receive notice of the accident in which your husband met his death?

Mr. Gearin: That is immaterial, your Honor.

The Witness: Five minutes after 12 on October 16th.

Q. Did you then go to the Eugene Hospital Clinic where he was being cared for?

A. I had a girl in the house that was gone to the store so I know exactly what time it was because she was going to have lunch with me before we heard of the accident.

(Testimony of Teresa Eastman.)

The Court: What is the purpose of this examination?

Mr. Sahlstrom: To show when he was received, 12:15, he [148] was unconscious, your Honor.

The Witness: She came back and had a car, took me from there to the hospital.

The Court: Whose pain and suffering?

Mr. Sahlstrom: Eric Eastman's.

The Court: If a man is unconscious it is pretty hard to have pain.

Mr. Sahlstrom: We are showing so far that he left the SP yards about 10:30.

The Court: The testimony is that he was unconscious when she arrived shortly after 12:00.

Mr. Gearin: We will so stipulate, your Honor.

Mr. Sahlstrom: Did he ever regain consciousness while you were there at the hospital? A. No.

Q. Did you remain with him until his death?

A. I did.

Q. What time did death occur?

A. At 11:00 o'clock at night he died.

Mr. Sahlstrom: Your witness.

Mr. Gearin: I have no questions.

The Court: That is all, Mrs. Eastman.

(Witness excused.)

Mr. Sahlstrom: We have one or two more exhibits, your Honor. We would like to offer his honorable discharge showing [149] he was a railroad man from 1918 on.

Mr. Gearin: It is immaterial.

Mr. Sahlstrom: A copy of letters of administration showing her authority.

Mr. Gearin: It is admitted. We admit that she is the administratrix, your Honor. I do not think it is necessary to have that in the record.

The Court: Has that not been admitted in the pre-trial order?

Mr. Gearin: Yes, your Honor.

The Court: In paragraph 3 it is admitted.

Mr. Sahlstrom: Those are all the exhibits, your Honor—excuse me, there is one more exhibit, the Basic Safety Code of the State of Oregon.

Mr. Gearin: It is immaterial as not having any applicability to the facts of this case.

Mr. Sahlstrom: We contend it does. We have placed in the pre-trial order the particular provision we rely upon.

The Court: We will admit that. All the others are rejected.

(Booklet, Basic Safety Code of the State of Oregon, previously marked Plaintiff's Exhibit Number 4 for identification was received in evidence.)

The Court: Does the plaintiff rest?

Mr. Sahlstrom: Yes. [150]

Mr. Gearin: Defendant rests.

The Court: Ladies and gentlemen of the jury, we will take a recess now. Please return at 10:00 o'clock on Tuesday morning. In the meantime, please do not discuss this case with anyone else. Please do not discuss this case with anyone. You

are now excused until 10:00 o'clock Tuesday morning.

(Jury retires.)

Mr. Gearin: At this time, if the Court please, the defendant respectfully moves the Court for an order directing the jury to return its verdict against the plaintiff and in favor of the defendant upon the following grounds, to-wit: One, there is no evidence substantially satisfactory or otherwise that the defendant is guilty of negligence in any particulars charged in the pre-trial order, or; that any act or omission on the part of the defendant constituted a proximate or contributing cause of his injuries and death, and; thirdly, it furthermore appears from all the evidence in the case that the deceased was guilty himself of negligence constituting the sole, proximate, contributing cause of his death.

The Court: I think you are right, but I'm not going to make a determination. If you want to argue the matter we will hear you at 10:00 o'clock tomorrow morning.

Mr. Gearin: I do not intend to argue the matter, your [151] Honor. I have just made my motion, and I think it is well taken.

The Court: Do you want to argue it?

Mr. Sahlstrom: I think we should be heard, your Honor.

The Court: I will just say as far as the blue flag is concerned I think it has no relevancy to this case at all because even though the rules require them to have a flag and they did not have a flag in this case, Eastman knew that Lambert was under the

car, and what more possible good could they do having a flag there? He was not going to be apprised of anything because he knew the dangers involved.

The testimony is undisputed that he was assigned to work on the flanger car and not on this car, and there is also testimony that he was told to keep away even though that was a little before. As far as any mechanical defects in the dump car is concerned, it would not have been on Track 15, it would not have been in the repair yard if it was in good condition. The reason it was there it was in poor condition and had to be repaired, and the law with reference to equipment that is in need of repair is somewhat different than the law with reference to items that are supposed to be in good working order, and here the testimony is also that so far as the locks were concerned in the first place, they had to keep the locks open in order to get the door down. That is what they were trying to do, and in addition to that, the witness [152] Lambert, I believe, testified that the door had not been fully closed, it was somewhat below the top, and, therefore, he could not close these locks, and one lock was off, one lock was open.

I do not think there is any evidence to go to the jury on, but I will hear you at 10:00 o'clock tomorrow morning, and I would suggest that you be here, Mr. Gearin.

Mr. Gearin: I shall, your Honor. [153]

Saturday, Jan. 22, 1955, 10:00 o'clock a.m.

(At this time counsel for the respective parties presented argument to the Court on defendant's motion for directed verdict.)

The Court: You have tried the case for a full day, and I think you have a right to have this case appealed, and I'm going to let you go to the jury, but I'm going to take this motion under advisement. I am not promising anything if a verdict comes in. You should know it right now, and if I do take any action I will not grant a new trial. I will just set aside the verdict and let you go up on it. [154]

Tuesday, Jan. 25, 1955, 10:00 o'clock a.m.

trial resumed

The Court: You have heard all the testimony, ladies and gentlemen of the jury. Now you are going to hear the arguments of the attorneys, and after that you will hear the instructions of the Court, and the case will be submitted to you. We will first hear from one of the attorneys for plaintiff.

(Thereupon the attorneys for the respective parties made their arguments to the jury.)

Court's Instruction to the Jury

The Court: Ladies and gentlemen of the jury:

You have now heard all the evidence and the arguments of the attorneys in the case of Teresa Eastman, Administratrix of the estate of Eric Gunner Eastman, plaintiff, against the Southern Pacific

Company, defendant. It is now my privilege and my duty to lay down for you the rules of law which you are to follow in deciding the questions of fact that I am about to submit to you.

It is your duty as jurors to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them in the evidence without bias, without prejudice, and without sympathy for or against either the plaintiff or the defendant. You are not to single out one instruction alone as stating the law. You must consider the instructions as a whole. Regardless of any opinion you might have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict on any other view of the law than that given in my instructions.

As I recently told you, you have heard the arguments of the attorneys, and what they say during the course of the trial in their arguments or to the Court is not evidence. I want to repeat. If your remembrance of any evidence is different than that related to you by a particular attorney, [156] then you rely on your own memory. The purpose of an argument to a jury is to suggest inferences and deductions which the particular attorney suggests can be drawn from the evidence. While you may follow the inferences and deductions that are made to you by a particular attorney if they seem reasonable and logical to you, you are not bound to do so. You are the sole and exclusive judges of all the facts in the case, and you are bound only by the testimony and the other evidence which is before you.

A judge in the Federal Court has the privilege of commenting on evidence. I shall not do so in this case because the questions of fact to be decided by you have been fully and carefully argued, and in spite of the delay from last Friday until today the case was short and the facts largely undisputed. If you know or think you know by any expression or words of mine what I think about this case and how it should be determined, you are not bound by my opinion on that subject. I repeat that you are the sole and exclusive judges of all the questions of fact and the credibility of all witnesses; however, I will lay down for you certain rules of law which govern you in your determination of the facts, and these rules are final and binding upon you whether you agree with them or not.

You are to decide the questions that are to be propounded to you solely on the basis of the evidence that has been [157] introduced at this trial, that is, the testimony and the exhibits and the instructions of the Court without, as I told you, any feeling of sympathy or bias or prejudice. If you have acquired or believe you have acquired any knowledge or information concerning any issue involved in this case from any source other than the evidence, you are not to convey such information to any other juror, and you are not to consider it yourself.

The defendant Southern Pacific Company is a corporation. A corporation must necessarily act through individual persons. It is admitted that the other members of the train crew with whom the decedent was working at the time and place of the

accident were employees of the Southern Pacific and that they were acting in the course of their duty, of their employment, at such time. Therefore, if you find that one or more of such other employees did or failed to do something which under the circumstances amounted to negligence, then such negligence, if any, would be deemed to be the negligence of Southern Pacific Company.

This action was brought by the plaintiff, Teresa E. Eastman, as the Administratrix of her husband's estate against the Southern Pacific Company under and pursuant to an act of Congress known as the Federal Employers' Liability Act. This act provides in substance that a common carrier by railroad engaged in interstate commerce shall be liable in damages [158] to any person suffering injury or death while he is employed by such carrier in interstate commerce, for injuries resulting in whole or in part from the negligence of any officer, agent, or employee of the railroad company or by reason of any defect or insufficiency due to the company's negligence in its cars, appliances, machinery, tracks, or other equipment. In other words, the liability which this act imposes upon a railroad company is liability for negligence. The Act does not make a railroad company an insurer of the safety of the decedent or any of its employees; therefore, before you can find that the defendant is liable to the plaintiff as the Administratrix of her husband's estate you must find that the railroad company breached its duty to the decedent; in other words, that the railroad company was guilty of negligence.

The mere fact that an accident occurred is no evidence of negligence, and you may not find that the defendant was negligent solely by reason of the fact that an accident occurred. The law does not impose liability upon any person in the absence of fault, nor does the law presume that any person is at fault in the absence of proof of such fault. On the contrary, the law presumes that each party, that is, the railroad company and the decedent both, exercised the care which an ordinarily prudent person would have exercised under all the circumstances.

If the accident happened when all the parties were in the [159] exercise of due care, then the law would not impose liability upon anyone. If the accident were an unavoidable one, that is, one without the fault on the part of anyone involved, there could be no recovery in this case.

The law imposes upon the party who claims that another is at fault the necessity of proving that claim by evidence, and that claim must not only be proved by evidence but by the greater weight of the evidence. This is known in law as the preponderance of the evidence. In other words, the burden of proving an allegation by the preponderance of evidence is laid upon the party making the claim.

Preponderance of evidence means the greater weight of the evidence. The greater weight of the evidence does not mean testimony by the greater number of witnesses, but it means evidence that is more convincing by reason of the credibility that you may give to the witnesses or by reason of other evidence that may have been introduced. If you

find upon any claim of negligence set forth by the plaintiff against the defendant that the evidence is evenly balanced or inclines toward a contention made by the defendant, then the plaintiff is not entitled to recover on that particular issue.

It was the duty of the defendant towards Mr. Eastman to act as a reasonably prudent person under all the circumstances at the time and place of the accident and in view of the attendant danger. A breach of that duty is called negligence. [160]

Negligence is defined as the doing of an act which a person of ordinary prudence would not have done under the same or similar circumstances or the failure to do an act which a person of ordinary prudence would have done under the same or similar circumstances. In determining whether the defendant exercised reasonable care at the time and place of the accident its conduct is to be measured against the standard of what a reasonably prudent person would have done or would not have done under the same or similar circumstances and in view of the attendant danger.

In other words, the degree of care which a person is required to maintain varies with the conditions. The greater the hazard the greater the care that must be exercised, and this rule is applicable to both Mr. Eastman and to the employees of the defendant company, that is, Mr. Lambert and Mr. MacGregor and Mr. Barker.

The plaintiff was required to specify the manner in which she claims that the railroad company was a fault or in which the railroad company breached

its duty to Mr. Eastman. I instruct you that the plaintiff is bound by the allegations of negligence charged against the defendant which I will outline for you, and she must recover, if at all, in this action upon those allegations and no others. Therefore, if you should believe that the defendant was guilty of negligence in some particular not mentioned in my instructions, you may [161] not consider such other negligence even if you find that such other negligence existed.

Before I take up the particular charges of negligence I call your attention to the fact that during the trial there were certain statements made and exhibits introduced which have no relevancy to this case. One relates to a rule of the company which provides that in case of serious injury employees are required to call the nearest surgeon. In order for this rule to be applicable it would be required that the employees knew of the serious character of the injury or in the exercise of reasonable care should have known of the seriousness of the injury which the decedent sustained, and, likewise, the plaintiff would be required to show some causal connection between the failure to call a surgeon and the death of the decedent. In this case there is no such evidence, and you are therefore instructed to disregard any claim of negligence based upon such allegation.

Second: There was other testimony with reference to the fact that the company should have had blue flags or red flags to warn workmen of the presence of these cars on the track. This regulation

of the company has no applicability to this case because the testimony is undisputed that the decedent knew of the presence of this car on the repair track and the fact that it was being worked on; therefore, you are to give no weight or effect to the presence or absence of flags [162] whether they be blue or red. They have nothing to do with the case. Finally, this might be an appropriate place to mention the fact which was mentioned by both the attorneys in the argument, that is, the testimony of Mr. Sutton. Mr. Sutton was called to testify not for the purpose of putting in substantive evidence. He was called merely to impeach the testimony of Mr. MacGregor, and that testimony may only be considered for that purpose and that purpose alone, whether you are to discredit Mr. MacGregor's testimony, and Mr. Sutton's testimony is not to be given any weight or effect other than that.

The claims of negligence upon which Mrs. Eastman as Administratrix must recover, if at all, are the following: First, in manipulating the dumping mechanism at a time when the door locks were in a state of repair and in an open position and decedent was standing in close proximity. That, Mrs. Eastman says, constitutes negligence. Now, you have heard the evidence, and I leave it to you to determine whether such conduct on the part of the railroad company's employees, even if proved by a preponderance of the evidence, amounts to negligence.

Negligence, as you will recall, is defined as the doing of an act which a person of ordinary pru-

dence would not have done under the same or similar circumstances or the failure [163] to do an act which a person of ordinary prudence would have done under the same or similar circumstances.

In determining whether defendant was negligent you are to consider the fact that defendant is not under any obligation to render its employment absolutely safe, nor is it required to do everything humanly possible to prevent accident or injuries. It is only required to exercise reasonable care. You are likewise to consider the fact that defendant's conduct is not being judged by what which now may appear it could have done to avoid the accident after all the facts and circumstances are brought before you. The defendant is to be judged only by that degree of care and caution which would be exercised by a person of ordinary prudence under like circumstances, in other words, as the circumstances appeared to him at that time.

As I have previously stated, plaintiff has the burden of proving its specifications of negligence by a preponderance of the evidence, and you will therefore determine whether the allegation has been proved and whether such conduct amounts to negligence. After you have done that you will consider the other specifications of negligence asserted by the plaintiff against the defendant. In all of them Mrs. Eastman complains of the failure of the railroad company and its employees to warn her husband. For example, specification number 2 alleges that the railroad company was negligent in failing to warn plaintiff of the dangerous nature of the

particular dump car. [164] Specifications number 3: In failing to warn decedent that the door locks on the side on which the door was to be dropped were in an open position and in a state of (sic) repair; four, in failing to give the decedent any warning prior to the time Mr. Lambert manually forced into position the dumping mechanism which caused the door to drop on the decedent.

With reference to these three specifications, you will first have to determine whether the railroad company did in fact fail to warn the decedent of the things about which the plaintiff complains, and if you find that plaintiff has proved such failure by a preponderance of the evidence you will then determine whether such conduct amounts to negligence. In connection with this determination, I instruct you that the defendant was under no duty to warn an employee of danger that is obvious, open, and apparent or, if the decedent knew or in the exercise of reasonable care should have known of the dangers attendant on his being in the vicinity of the dump car when it was being worked on, then too there would be no necessity for the defendant to have warned him of such danger. You should also consider and use as a guide the definition of negligence that I have heretofore given you in connection with the first specification of negligence.

If the plaintiff fails to prove that the defendant was guilty of negligence in any one of the specifications of negligence that I have read to you, then your deliberations [165] will be at an end, and you will return a verdict in favor of defendant. If,

however, you find that the defendant was guilty of negligence as set forth in one or more of the specifications by a preponderance of evidence, you will then consider the question of proximate cause.

Proximate cause is probable cause. It is that cause which alone or in conjunction with other causes produced the accident or injury. Thus, an act or omission of a person which sets in operation some factor or other thing that brings about an injury is held to be a proximate cause of the injury unless the causal force of the operation of the act or omission has been broken by some new or intervening cause prior to the accident. A cause without which a result would not have occurred is a proximate cause.

This does not mean that the law recognizes only one proximate cause of injury consisting of only one act or omission by one person. On the contrary, acts or omissions by one or more persons may operate or work concurrently either individually or together to cause an injury, and in such case each is regarded in law as a proximate cause. The plaintiff need not prove, in order to recover, that the negligence of the defendant was the sole proximate cause of the decedent's injuries or death. The defendant is liable to the plaintiff even though its negligence is only a contributing or a concurring proximate cause. [166]

The defendant has denied that it was guilty of negligence in any of the respects alleged by Mrs. Eastman, and it claims that the injuries which Mr. Eastman suffered were due solely to his own negli-

gence or inadvertence. The defendant has alleged that the decedent was guilty of negligence in certain particulars, and you may consider these specifications and no others. On the specifications of negligence asserted by the defendant against the decedent the defendant has the burden of proof, and, likewise, even if you believe that the defendant was guilty of negligence in some other particular not set forth in defendant's specifications of negligence you may not consider such other negligence even if you find that it did exist.

I want to call your attention again to the fact that if Mrs. Eastman has failed to prove any negligence on the part of the railroad company which caused the accident, then your deliberations will be at an end right then, and you do not have to consider these specifications which the railroad company has asserted against Mrs. Eastman, but if the plaintiff has proved that the railroad company was liable in any one or more of the respects that she has alleged and that was the proximate cause of the accident or a proximate cause, then you would consider these other specifications, and you would also consider it in connection with one other situation, and that is as you look over the whole testimony, all the testimony [167] as you are required to do, if you find that the plaintiff did something which the railroad company specifies was the sole cause of the accident, then, of course, the plaintiff cannot recover, and I will cover that right now.

The defendant has alleged that the decedent was guilty of negligence in three particulars and that

such negligence was the sole cause of the accident which resulted in his death. These are the three charges: First, that the decedent voluntarily left work to which he had been assigned and stood by and in close proximity to a dump car which was being repaired when there was no justification or excuse for his so doing; secondly, that the decedent failed to pay heed to the instructions and warning given by other employees to stand in the clear of said dump car; third, that the decedent suddenly and without warning left his place of safety along said dump car and walked forward directly alongside the dump car when he knew or in the exercise of reasonable care should have known that it was unsafe for him to have done so.

If you find that the decedent was guilty of negligence in one or more of the three particulars that I have read to you and that such negligence was the sole cause of the accident, the plaintiff may not recover. The reason for this should be fairly obvious. If the decedent was solely responsible for the accident which resulted in his death, then even though defendant did something which it should not have done or failed to do something [168] which it should have done such conduct could not have caused the accident if the decedent's conduct was solely responsible for the accident.

On the specifications of negligence asserted by the railroad company against the decedent the defendant railroad company has the burden of proof, and it must prove one or more of said allegations by a preponderance of the evidence, and, likewise,

it must show that such negligence was the proximate cause of the accident.

If you find that the defendant or one or more of its employees was guilty of negligence in one or more of the particulars that I have outlined to you, and if you also find that such negligence contributed to the accident and the resultant death of Mr. Eastman, then the plaintiff is entitled to recover even though you also find that Mr. Eastman himself was guilty of negligence which likewise contributed to the accident. This is true because under the Federal Employers' Liability Act negligence on the part of an employee such as Mr. Eastman which merely contributed to the accident can only be considered in mitigation of damages.

If you find in favor of Mrs. Eastman on the basis of the instructions that I have heretofore given you, then you should determine the amount of damages that plaintiff should be awarded. In assessing damages for the plaintiff upon her action to recover damages for the death of her husband you [169] will assess such sum of money as will be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits which would have resulted from the continued life of the deceased. That is to say, you will assess such sum of money as damages to plaintiff as she would have received as the wife of the deceased, Eric Gunner Eastman, had he lived. That is, the amount of damages should be the pecuniary benefits to her from the money that Mr. Eastman would have made. It is not how much money he brought into the home, for

example, but it is the net amount that she would have received plus the other pecuniary benefits which she would have received had Mr. Eastman lived.

You were instructed that under the American Standard Mortality Tables a man of 57 years has a life expectancy of 16.43; however, the decedent, Eric Gunner Eastman, his life expectancy is a question of fact for you to determine taking into consideration the decedent's age, sex, health habits, and the nature of his occupation, whether hazardous or not, and the fact that he has a life expectancy of 16.43 years does not mean that had he not been in this accident he would have lived that long or that he would not have lived longer, and, likewise, that life expectancy does not determine the number of years that he would have worked and earned money. He was 57. That would have brought him to about 73 and a half years old. In assessing plaintiff's damages, you may [170] take into consideration his life expectancy, as I have told you, and you may also take into consideration Mrs. Eastman's life expectancy determined as of the date of death of Eric Gunner Eastman. Mrs. Eastman at that time was 61 years old, and under the American Standard Mortality Tables she had a life expectancy of 14 years; however, plaintiff's life expectancy as the wife of the decedent is a question of fact for you to determine taking into consideration her age, sex, health habits, and the nature of her occupation, whether hazardous or not.

On arriving at the amount of pecuniary loss

which Mrs. Eastman would have sustained, you will determine whether the amount of damages to be awarded should be reduced because of any contributory negligence on the part of Mr. Eastman himself. If you find that Mr. Eastman was negligent in one or more of the respects charged and that such negligence contributed to his death, you will reduce the amount of damages which you have found in proportion to that amount of negligence of the respective parties. In other words, if you find that Mr. Eastman was contributorily negligent and that his negligence was responsible for fifty per cent of his fatal accident, then you would reduce the amount of damages by fifty per cent, and you would award plaintiff fifty per cent or one-half of the recovery which you would ordinarily have given her had Mr. Eastman not been guilty of any negligence. If the decedent's negligence contributed to the extent of ten per cent the award should be reduced by that amount, and if he were guilty of negligence to the amount of twenty-five or thirty-three and a third per cent then the award should be three-quarters or two-thirds of what would normally have been given plaintiff had her late husband not been negligent. These are merely examples, and you can do the same with any other proportion that you might figure out.

The amount of damages which you find which has, or probably will be sustained by plaintiff after the reduction, if any, because of any contributory negligence shall then be reduced to its present value, and such amount will be the amount of your verdict in

case you find that plaintiff is entitled to recover. However, as I previously told you, you will not be called upon to determine damages until and unless you find that the Southern Pacific Company was guilty of some negligence as alleged by the plaintiff and that such negligence caused or contributed to the accident and the resultant death of Eric Gunner Eastman, and the fact that I am instructing you on the question of damages that does not mean that I am or am not of the opinion that plaintiff is entitled to recover. On that issue I am expressing no opinion one way or the other.

This case is not to be tried on the basis of any sympathy or passion or prejudice. Your decision must be reached and [172] founded upon an unprejudiced consideration of all the facts and without any desire to punish anyone and without any thought of plaintiff's financial condition or the defendant's ability to pay. You are to be guided solely by the evidence in the case and by the rules of law which I have laid down for you.

You are the sole and exclusive judges of the facts in the case and the credibility of all witnesses. Your power of judging the effect or value of evidence, however, is not arbitrary but must be exercised with legal discretion and in subordination to the rules of evidence.

The testimony of any witness to whom you give full credit and belief is sufficient to establish any issue in the case. Every witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which he testifies, the

character of his testimony, or by evidence affecting his character or motives or by contradictory evidence.

If you find that a witness has testified falsely in any one material part of his testimony you should look with distrust upon the other evidence given by such witness, and if you find that any witness has testified wilfully false it will be your duty to disregard entirely all the evidence given by such witness unless corroborated by other evidence which you do believe.

You should look with caution upon the oral admission of [173] a party or of a witness as that kind of evidence is subject to mistake. The party himself may have been misinformed or may not have clearly expressed his meaning, or the witness may have misunderstood him. That instruction with reference to oral admissions is relative to the testimony of Mr. MacGregor and Mr. Sutton. You will first have to decide whether the admissions alleged to have been made by Mr. MacGregor in Mr. Sutton's presence were actually made or whether Mr. Sutton may have misunderstood him.

You will have with you two forms of verdict, one for the plaintiff and one for the defendant. The verdict for plaintiff reads: "We, the jury duly empaneled and sworn to well and truly try the above-entitled cause, do find our verdict in favor of plaintiff and against the defendant and assess plaintiff's damages in the sum of blank dollars." If you decide in favor of plaintiff, you will use this form of verdict, and you will insert in that blank space the

amount to which you believe plaintiff is entitled. In the Federal Court the verdicts of the jury must be unanimous, unanimous upon every issue in the case; therefore, the verdict as to the amount, in the event you find for plaintiff, must be the considered judgment of each of the jurors.

It has been known in the past that in order to arrive at a verdict the jurors have agreed upon some mechanical process. For example, they have agreed that each one will put down on [174] a piece of paper the amount to which he or she believed the plaintiff is entitled, then added it up and got a sum, and then divided it by 18 and say this would be the verdict of the jury. You cannot agree in advance to anything of that kind. That is known as a quotient verdict, and it is illegal. Of course, if you come to the question of damages you are expected to discuss it with each other, but after you arrive at a verdict, in arriving at a verdict you must select the figure which is satisfactory to each of the jurors, and you cannot do it by any mechanical means.

If, on the other hand, you find against the plaintiff and in favor of the Southern Pacific Company you will use the form of verdict which reads: "We, the jury duly empaneled and sworn to try the above-entitled cause, do find our verdict in favor of the defendant and against the plaintiff." Here, again, when you return that verdict it must be a unanimous verdict.

The verdicts provide only for signature by the foreman. Let me admonish the foreman, whoever

he or she may be, to make sure that the verdict that is signed represents the unanimous opinion of each of the 11 jurors.

Before the case is submitted there is a matter that I would like to take up with counsel in chambers.

(Thereupon, the following proceedings were had in the Court's chambers:) [175]

Mr. Peterson: Your Honor, that rule as to procedure in the Federal District Court is a little unclear to me as to the manner in which exceptions must be taken. No exception is necessary, as I read the rule, when an objection is made.

The Court: You are going to have to object to any instruction that I gave that you believe erroneous, and if you think that I was in error in failing to give any requested instruction you will have to set forth the requested instruction that I failed to give.

Mr. Peterson: Plaintiff excepts to the Court's withdrawal from the consideration of the jury plaintiff's contentions 1, 4, 5, 6, 9 and 10 on the ground and for the reason that there is substantial evidence to submit to the jury on those questions.

The plaintiff excepts to the Court's instructing the jury that they would disregard all testimony in the case respecting the absence of a blue flag in violation of a company ruling respecting placement of a blue flag.

The plaintiff excepts to the Court's instructing the jury that the plaintiff was not entitled to recover if the decedent's death was due to unavoid-

able accident. The point of that exception is that there is no phase of this case that can be classified as being an unavoidable accident within the meaning of the decided cases.

The plaintiff excepts to the Court's instructing the [176] jury to disregard the company rule with respect to calling a surgeon upon injury coupled with the Court's statement that that rule could only apply if the employees had full knowledge of the seriousness of the injury sustained by the injured person and further instructing the jury that there must have been a proof of a causal connection between a violation of such company rule and death, the purpose of that being that we submit that that was proper evidence for the jury's consideration on the pain and suffering contention.

The plaintiff requests the Court that it instruct the jury that MacGregor's testimony was not an oral admission. The Court gave contradictory instructions to the jury in this respect. The Court advised the jury that the witness Sutton, that his testimony was solely for the purpose of impeaching the credibility of the witness MacGregor and that they could consider Sutton's testimony solely and only for that purpose and for no other purpose as it was not substantive evidence. Now, then, the Court later on instructed the jury the oral admissions of a party are to be viewed with caution, and the Court stated to the jury—

The Court: Yes, I think you are right. I will go back and tell them that the statement of Mac-

Gregor was not an admission and to disregard all the instruction with reference to admissions.

Mr. Peterson: I think that would be an error that one [177] could claim. I am calling it to the Court's attention.

The Court: I am going to clear that up.

Mr. Peterson: The plaintiff excepts to the Court's instructing the jury that no warning was necessary of an open, obvious conduct with application to the car because it has no application in this case. There is no showing that Eastman knew of any open or obvious omission. It was a comment on the evidence not merited by the evidence.

Plaintiff excepts to the Court submitting to the jury and instructing the jury that the defendant's contentions of sole negligence on the part of the decedent would be a complete defense to this action.

The Court: What did I say?

Mr. Peterson: The Court submitted to the jury the defendant's contention—the Court said to the jury that the defendant contends in this case that the accident was caused solely by the negligence of Eastman in three particulars, and those three particulars are set forth. Now, then, you said the defendant has the burden of proof on those three charges of negligence, and if the jury finds that any one of those charges of negligence was the sole cause, sole proximate cause of his death, then the plaintiff could not recover. The point of my exception is that first, as I read defendant's contentions, it is not claimed unless by use of the word "proximate" the defendant contends that it was the

sole proximate [178] cause. Paragraph 3 on page 10.

The Court: All right, go ahead.

Mr. Peterson: I think under the law and the facts in this case that those contentions could not be other than contributory negligence.

The Court: Go ahead.

Mr. Peterson: The plaintiff excepts to the Court's instruction to the jury only in part as to a quotient verdict. The Court instructed the jury, as I heard the Court and if my memory serves me correctly, that they could not agree beforehand to be bound by a mechanical means of a verdict which is a quotient verdict and which is condemned by the Courts and which was proper up to that point, but then the Court went on to say that they could not go in the jury room and use mechanical means to arrive at a verdict. As I understand the latest language concerning a quotient verdict, the evil of it is an agreement beforehand by the jurors to be bound by this mechanical method and not that they cannot use mechanical methods because they would have to use mechanical methods in the jury room in discussing and determining the plaintiff's damages.

The plaintiff excepts to the Court withdrawing from the consideration of the jury the plaintiff's contention of damages by reason of conscious pain and suffering of the decedent from the time of receiving the injury until his death. [179]

That is all, nothing further.

Mr. Sahlstrom: Do you recall that the Judge

when he read the specification, I think it is number 2, that he read "repair" in lieu of the word "disrepair" as to the lock. That is what my understanding is of what the Court said, that the lock was in a condition of "repair" instead of "disrepair."

(Discussion off the record.)

Mr. Gearin: The defendant, your Honor, respectfully objects to the failure of the Court to give its requested instructions numbers 1 and 2 on the grounds and for the reasons as set forth in our motion for a directed verdict which was taken under advisement by the Court.

We furthermore object to your Honor's submitting to the jury in any of its phases for the same reasons and the same grounds, we object to the failure of the Court to give our requested instruction number 6-A and -B on the ground and for the reason that the law is, as I see it, if the deceased met his death while engaged on a frolic he cannot recover, that being the substance of our request.

We object to the failure of the Court to give our requested instruction number 8 which submits to the jury the proposition that if an employee is given warning and he disobeys the rule of his employer and his death is occasioned as a result thereof there can be no recovery. [180]

We object to the failure of the Court to give our requested instruction number 10 which is a correct statement of the law to the effect that Lambert had a right to assume the deceased would remain in a

place of safety, he being seen there just before Lambert went under the car.

We object to the failure of the Court to give our requested instruction number 11 which we believe to be a correct statement of the law in regard to contributory negligence. A workman who unnecessarily put himself into a dangerous place cannot recover if there is a safer place for him to go.

We object to the failure of the Court to give our requested instruction number 56 on the ground and for the reason that it is entirely proper for the Court and the Court should give the instruction regarding income tax, the amount for which the jury award is, not subject to income tax, and the jury should be so instructed since there is testimony of his gross earnings.

The Court: Did you say that you were going to rely on my misstatements with reference to the admission, or did you say that that is something Mr. Gearin can rely on? Do you want me to go out there and reinstruct them on the question of admission?

Mr. Gearin: No, your Honor, I do not think so at this time.

The Court: Do you want me to do that? [181]

Mr. Peterson: No.

The Court: Do you withdraw it then?

Mr. Peterson: I withdraw it.

(Thereupon, the following proceedings were had in open court:)

The Court: You will have with you in the jury

room the exhibits that have been admitted in evidence, and you will have these two forms of verdict.

Swear the bailiff.

(Thereupon the bailiff was sworn.)

The Court: You are now excused.

(Jury retires for deliberation on a verdict.)

(Trial concluded.)

[Endorsed]: Filed April 7, 1955.

[Endorsed]: No. 14722. United States Court of Appeals for the Ninth Circuit. Teresa E. Eastman, Administratrix of the Estate of Eric Gunner Eastman, deceased, or individually as his surviving widow, Appellant, vs. Southern Pacific Company, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: April 8, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14722

TERESA E. EASTMAN, Administratrix of the
Estate of Eric Gunner Eastman, deceased, or
individually as his surviving widow,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant.

STATEMENT OF POINTS

Comes Now the Plaintiff-Appellant and files this
her Statement of Points on which she intends to
rely in the appeal of this cause:

(1) The District Court erred in entering judgment for the Defendant notwithstanding the verdict returned by the jury in favor of the Plaintiff.

(2) The lower District Court erred in holding that there was no negligence on the part of the Defendant, which was the proximate cause of the death of the deceased, Eric Gunner Eastman.

(3) The lower District Court erred in refusing to follow the decision of the United States Supreme Court in the case of Wilkerson vs. McCarthy 336 US 53.

Dated at Eugene, Lane County, Oregon, this 12th day of April, 1955.

/s/ E. B. SAHLSTROM,
Of Counsel

[Endorsed]: Filed Apr. 14, 1955. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between John Gordon Gearin of Counsel for Defendant-Respondent and E. B. Sahlstrom of Counsel for Plaintiff-Appellant, that this Court may in the review and the consideration of this appeal refer to the original exhibits on file with the Clerk of this Court without the reproducing of the exhibits in the printed record.

Dated this 14th day of April, 1955.

/s/ JOHN GORDON GEARIN,
of Counsel for Defendant-
Respondent

/s/ E. B. SAHLSTROM,
of Counsel for Plaintiff-
Appellant

[Endorsed]: Filed Apr. 18, 1955. Paul P. O'Brien,
Clerk.